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IN THE

Supreme Court of the United States

October Term, 1970

No. ~~1872~~ 70-327

David C. Rust, 70-327

Petitioner,

vs.

Court of Appeal of the State of California, Third Appellate District,

Respondent.

Petition for Writ of Certiorari to the Court of Appeal of the State of California, Third Appellate District.

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IN THE

Supreme Court of the United States

October Term, 1970
No. ....

DAVID C. RUST, *Petitioner,*

vs.

COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT,

Respondent.

Petition for Writ of Certiorari to the Court of Appeal of the State of California, Third Appellate District.

David C. Rust respectfully prays that a Writ of Certiorari issue to review the judgment of the Court of Appeal of the State of California, Third Appellate District, filed on January 20, 1971, and described more fully below.

Citation to the Opinion Below.

The published opinion of the Court of Appeal is printed as Appendix A hereto and is reported in the California Official Reports at 14 Cal.App.3d 530, and in the California Reporter at 92 Cal.Rptr. 329. An unpublished opinion denying Petitioner's Application for Leave to Petition for Rehearing in the Court of Appeal is printed as Appendix B hereto.

Jurisdiction.

The opinion and judgment of the Court of Appeal was entered on January 20, 1971. Petitioner applied for leave to petition Respondent Court of Appeal for rehearing, which Application was denied by opinion dated February 17, 1971 (Appendix B). Petitioner's application for a hearing to the California Supreme Court was denied on March 26, 1971.[1] He has exhausted his State Court remedies.

The jurisdiction of this Court is invoked under Title 28, United States Code §1257(3).

Question Presented.

The question presented involves the Due Process Clause of the United States Constitution, Amendment XIV, §1.

In the recent case of *Wisconsin v. Constantineau,* 91 S.Ct. 507, this Court stated at page 510:

> "Where a person's good name, reputation, honor or integrity are at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. . . ."

The question presented here is whether the foregoing rule of due process applies where the government agency is an appellate court and where the person aggrieved is an attorney who appears before it. Petitioner contends that the question must be answered in the affirmative.

The question arises as follows:

Petitioner, David C. Rust, was one of the attorneys of record in two consolidated cases which were before Respondent Court of Appeal as original writ proceedings. In reviewing the proceedings of the Trial Court, Respondent Court of Appeal formed the opinion that in certain enumerated particulars Petitioner was guilty of unprofessional conduct. By letter dated October 8, 1970, it addressed an inquiry to all attorneys, including Petitioner. Petitioner and others responded by verified declarations denying the Court's charges, and Petitioner requested a hearing if Respondent Court was not satisfied that the charges were untrue.

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[1] Petitioner also filed an Original Writ of Mandate, Prohibition or for Other Appropriate Relief in the California Supreme Court, which was denied on March 26, 1971.

On January 20, 1971, Respondent Court published an opinion (Appendix A) libelous of Petitioner and declaring him to be guilty of acts of serious professional misconduct and gross improprieties *other than those as to which it had previously made inquiry.*

The purported acts of misconduct of which Respondent Court accused Petitioner and found him guilty did not occur in the presence of Respondent Court, do not appear in the record before said Court,[2] and Petitioner was not afforded a hearing or any other opportunity to respond.

He thereupon applied to Respondent Court for a hearing and was informed that he had no standing to obtain review (Appendix B). Petitioner has at all times contended and now contends that the accusations made against him in the published opinion of Respondent Court are in fact inaccurate and untruthful and, as described more fully below, he has at every stage requested both Respondent Court of Appeal and the California Supreme Court to afford him a hearing at which he can disprove said accusations.

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[2] At the outset, Petitioner wishes to emphasize that he does not challenge the right of a court to censure an attorney for misconduct which occurs in the presence of the court or which appears on the face of the record before the court.

Respondent Court of Appeal's opinion has been published in the California Official Reports Advance Sheets and in the California Reporter Advance Sheets, and will be published in the permanent volumes of said publications. Said opinion has been and will continue to be circulated among members of the Bench and Bar with whom Petitioner associates, among other subscribing attorneys, to libraries and other institutions in the State of California and elsewhere, and to clients of Petitioner. The resulting injury to Petitioner's professional reputation and career, and to his good name, *honor and integrity is incalculable and will be substantially irreparable.*

Petitioner contends that, like Mrs. Constantineau, his good name, reputation, honor and integrity may not be impaired unless he first be afforded an opportunity to be heard in his own defense.

Constitutional Provisions Involved.

The Constitutional provision involved is the Due Process Clause of the Fourteenth Amendment to the United States Constitution (U.S. Const., Amend. XIV, §1).

Statement of the Case.[3]

A. Background—Earlier Litigation.

The present case was before the Court of Appeal as an original writ proceeding and arose out of the following earlier litigation:

1. On January 25, 1968, one Max G. Giles (Giles) filed an action for personal injury in the Su-

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[3] This Statement of the Case has been abbreviated in order that the Court will not be burdened with factual detail not essential to a description of the Constitutional issue presented.

perior Court of the State of California, County of. Shasta, seeking damages for personal injuries against a number of defendants, including Douglas Guardian Warehouse (Warehouse) and Hyster Company (Hyster). Petitioner appeared as attorney for Warehouse.

2. The case was ordered bifurcated for trial, with the liability issue to be tried first. During the liability trial, the parties settled the case, the settlement was announced to the Trial Court, the case was continued, and Petitioner left the courtroom.[4]

Shortly thereafter, the settlement between the Plaintiff and defendants other than Warehouse was abrogated. A dispute then arose between Plaintiff's attorney, Mr. Halpin, and Petitioner as to whether the settlement between the Plaintiff and Warehouse ($25,000 out of a total settlement of $200,000) was still binding or whether it became void when the Plaintiff's settlement with other defendants aborted. Petitioner contended it was binding and valid, Mr. Halpin contended it was not.

The dispute could not be resolved, the liability phase of the trial was resumed and completed, and the Trial Court ruled that Defendants Warehouse and Hyster were liable to Giles. The damage phase of the trial was set to be tried to a jury approximately ninety days thereafter.

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[4] The nature of this settlement and the manner in which it was announced to the Trial Judge are of great significance to one of the accusations made against Petitioner in Respondent Court of Appeal's published opinion, to wit: that Petitioner misrepresented said facts in a verified petition he subsequently filed in another action. According to Respondent Court of Appeal, only a tentative settlement was announced to the Trial Court, whereas Petitioner contends and is prepared to prove by unimpeachable evidence, including the official minutes of the Shasta County Trial Court, that a firm settlement was announced in open Court.

3. Meanwhile, Petitioner was instructed by his client to enforce the settlement agreement. Petitioner suggested and Mr. Halpin agreed that the action should be filed in Sacramento County, rather than Shasta County where the personal injury action was pending, in order to avoid improperly prejudicing Mr. Giles' pending damage trial.[5] Mr. Halpin and Mr. Giles entered their appearance,[6] the case was tried without a jury, and the Sacramento Superior Court ruled that there was a binding settlement between Warehouse and Giles as petitioner had contended.

4. Giles thereupon filed an original writ proceeding in the Court of Appeal to challenge the jurisdiction of the Sacramento Superior Court. Hyster, the remaining defendant in the Shasta County Action (and not a party to the Sacramento action) also brought an original writ proceeding in Respondent Court of Appeal to challenge the jurisdiction of the Sacramento Trial Court. These proceedings resulted in the Court of Appeal opinion of January 20, 1971, which is here in issue.

B. Background—Proceedings in the Court of Appeal.

1. While the case was pending in Respondent Court of Appeal, the Court issued a letter to all attorneys, dated October 8, 1970, a copy of which is attached hereto as Appendix C. The Court of Appeal indicated its belief that Petitioner and, in part, Mr. Halpin were guilty of specific acts of misconduct in

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[5] Both Petitioner and Mr. Halpin were of the belief that if the settlement action was filed in Shasta Superior Court, which is located in the small community of Redding, California, information concerning said settlement would become known in the community and would seriously and improperly prejudice Mr. Giles' damage claim.

[6] Mr. Halpin was named as a defendant.

the case and it requested information and argument pertaining to said conduct. Briefly, the letter contained the following "accusations" or requests for information:

a. In Paragraph 1, the Court noted that the Complaint in the Sacramento County action (which was verified by Petitioner) alleged a settlement between Giles and Warehouse in the sum of $25,000, whereas the Court stated that the correct figure was $50,000. No explanation of this discrepancy was requested, but, as noted below, reply was made.

b. The letter then noted a purported discrepancy between the settlement agreement as pleaded and as described in the Trial Court's findings, which were "prepared on the stationery of Mr. Rust", and it requested "explanation as to how and why such findings were so prepared and under what representations the court was induced to sign findings outside the record."

c. Finally, Respondent Court referred to a letter agreement between Petitioner and Mr. Halpin which, according to Hyster's Petition in Respondent Court, rendered the Sacramento action moot. Respondent Court ordered that the letter or a certified copy be filed with the Court and indicated it would permit argument as to why the letter was not a proposal for fictitious litigation, why sanctions for commission of a fraud upon the Superior Court and upon Respondent Court of Appeal should not be imposed, and it expressed the view that:

> "The letter, as the Court now views the matter, constitutes collusion in the institution of the Sacramento County action."[7]

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[7] The Court of Appeal had not yet seen the letter.

2. In response to said letter, Petitioner, two members of his firm, and several other attorneys associated with the case promptly filed verified Declarations with the Court,[8] which replied to Respondent Court's inquiries as follows:

a. The $25,000 settlement figure referred to in the Warehouse complaint verified by Petitioner was correct. The $50,000 figure, which appeared in the verified Petition filed in Respondent Court of Appeal on behalf of Hyster Company was incorrect. The attorney for Hyster acknowledged the error.

b. As to the circumstances under which the findings in the Sacramento County action were prepared, it was established without contradiction that the findings were prepared by the Sacramento County Trial Judge himself. No representations (other than the evidence itself) were made to induce him to sign said findings.

c. The accusations of fraud upon the Court and of engaging in fictitious litigation were categorically denied both by Petitioner and by Mr. Halpin, both for themselves and their clients. No sanctions were imposed and no criticism was leveled against Mr. Halpin in connection with said letter agreement.

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[8] Petitioner's counsel also filed a Memorandum of Points and Authorities with Respondent Court in which he stated that the summary procedure outlined in the Court's letter for answering the accusations "does not meet the minimum requirements of due process, and reply is made to said letter with the reservation that neither Mr. Rust, nor any member of his firm, nor Douglas Guardian Warehouse waives any right to a full and impartial hearing conducted in accordance with all of the requirements of due process."

C. The Court of Appeal Opinion.

Nothing further occurred until Respondent Court of Appeal published its opinion on January 20, 1971. Briefly summarized, the Court of Appeal both by direct accusation and by unmistakable inference found Petitioner guilty of acts of serious misconduct and gross impropriety and impugned Petitioner's integrity, motives and activities in nearly every aspect of this case.[9] Among other things, the Court of Appeal opinion states that Petitioner "falsely alleged" certain facts in the Complaint which he verified (Appendix A, page 3); that said recital of facts were "blatantly and blandly untrue" (Appendix A, page 10);[10] it expresses disbelief that Petitioner brought the settlement action in Sacramento County for proper motives (Appendix A, page 9, footnote 1); it accuses Petitioner of a "court-shopping adventure" (Appendix A, page 14); it strongly implies throughout that Petitioner deliberately mislead the Sacramento Superior Court with reference to the Shasta County action and the settlement agreement;[11] and Respondent Court stated ". . . we are far from conceding that Warehouse ever had a settlement or that its contention possessed even arguable merit. Many things point to the fact that Warehouse did not even urge the settlement in good faith." (Appendix A. page 22.)[12]

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[9] In his Petition for Rehearing in Respondent Court of Appeal, in his Petition for Hearing in the California Supreme Court, and in his Petition for Writ of Mandate, Prohibition or Other Appropriate Relief in the Supreme Court of California, Petitioner has challenged and denied every accusation of misconduct, has consistenly pointed out that they were made without a hearing, and has vigorously sought a hearing.

[10] The Sacramento Superior Court inferentially found said allegations to be true, and Petitioner stands ready, if afforded an opportunity, to again prove that they are true.

[11] Following publication of Respondent Court of Appeal's opinion (Appendix A) and in support of Petitioner's Application to Respondent Court of Appeal for a rehearing, both of the Sacramento Superior Court judges who participated in said case filed verified declarations on Petitioner's behalf denying that he had mislead them and indicating the belief that Petitioner had commenced and prosecuted said action in good faith.

None of the alleged acts of misconduct by Petitioner occurred in the presence of the Court of Appeal. None can be substantiated on the basis of the record before the Court of Appeal. None of the charges of misconduct were the same as the ones to which the Court requested answers in its letter of October 8, 1970.

No hearing was held to determine the truth and accuracy of the charges set forth in Respondent Court of Appeal's opinion. Respondent Court of Appeal did not order a reference, it did not afford Petitioner a hearing; it received verified Declarations from Petitioner and several other attorneys in response to the charges set forth in its letter of October 8, 1970 (which Declarations obviously were not prepared with reference to or knowledge of the charges ultimately made against Petitioner), and it then proceeded to use said Declarations to "prove" the charges set forth in its opinion, in part by drawing adverse and incorrect inferences from the absence of answers to questions which were never asked.

A detailed analysis and refutation of the Court of Appeal opinion is not appropriate in this Petition, but does appear in Petition for Rehearing filed in Respondent Court, in the Petition for Hearing filed in the California Supreme Court and in the Petition for Writ of Mandate, Prohibition or Other Appropriate Relief filed in the California Supreme Court, copies of which will be filed with this Court at such time as they may be requested.

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[12] This despite the fact that Warehouse had actually prevailed in the lower court and no transcript of the oral testimony was before Respondent Court of Appeal.

The Manner in Which Petitioner First Raised the Constitutional Questions Here Presented.

1. As noted in Footnote 8, even in response to the Court of Appeal's letter of October 8, 1970, which did not specify the serious charges made against Petitioner in Respondent Court of Appeal's subsequent opinion, Petitioner raised the due process issue.

2. Upon receipt of a copy of the Court of Appeal opinion of January 20, 1971, Petitioner's counsel addressed a letter to the Presiding Justice of Respondent Court, dated January 26, 1971, advising the Court that an Application for Leave to Petition for Rehearing and Petition for Rehearing would shortly be filed on Petitioner's behalf and requesting the Court to stay publication of its opinion or to certify its opinion for non-publication. The Court was advised in said letter that:

> "Among other things, it will be contended in said Petition that (1) the summary proceedings by which this Court made its determinations concerning Mr. Rust's conduct violate due process and (2) said determinations are in significant respect unsupported by the record and are factually inaccurate."

Petitioner's request to stay publication of the opinion or to have it certified for non-publication was denied on January 28, 1971.

3. Thereupon, Petitioner filed a document entitled Application for Leave to Petition for a Rehearing in the Court of Appeal as an Added Respondent and Petition for Rehearing, in which Petitioner fully raised the Constitutional issue presented herein, at pages 1-14, which are reproduced herein as Appendix D. Said Application was denied by opinion of Respondent

Court of Appeal filed February 17, 1971 (Appendix B hereto), in which Petitioner was held to have no standing to object.

4. On February 11, 1971 Petitioner filed in the California Supreme Court a Petition for Writ of Mandate Prohibition or Other Appropriate Relief in which he fully raised the Constitutional issue presented herein at pages 24-31, which are reproduced herein as Appendix E. Said Petition was denied by the California Supreme Court on March 26, 1971.

5. On March 1, 1971, Petitioner timely filed in the California Supreme Court a document entitled Application of David C. Rust for Leave to Petition for a Hearing in the Supreme Court and Petition for Hearing, in which he fully raised the Constitutional issue presented herein at pages 1-10 and 24-31, which pages are reproduced herein as Appendix F. Said Petition for Hearing was denied by the California Supreme Court on March 26, 1971.

ARGUMENT.

A. Respondent Court of Appeal May Not Impair Petitioner's Good Name, Reputation, Honor or Integrity or Impair His Professional Career Without Affording Him Notice of the Charges Against Him and an Opportunity to Be Heard.

In the recent case of *Wisconsin v. Constantineau,* 91 S.Ct. 507, this Court declared unconstitutional a Wisconsin statute which permitted a public official to post a notice that Mrs. Constantineau was an excessive drinker without first affording her notice and a hearing at which she could challenge that unflattering characterization. This Court stated at pages 509-510:

> "We have no doubt as to the power of a State to deal with the evils described in the Act. The police power of the States over intoxicating liquors was extremely broad even prior to the Twenty-First Amendment. (Citation.) The only issue present here is whether the lable or characterization given a person by 'posting,' though a mark of serious illness to some is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard. We agree with the District Court that the private interest is such that those requirements of procedural process must be met.
>
> "It is significant that most of the provisions of the Bill of Rights are procedural, for it is procedure that marks much of the difference between rule by law and rule by fiat.
>
> ". . . certainly where the State attaches 'a badge of infamy' to the citizen, due process comes into play. (Citation.) '. . . the right to be heard before

> being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.' (Citation.)
>
> "*Where a person's good name, reputation, honor or integrity are at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.* . . . Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented." (Emphasis added).[13]

In the present case, there can be no question but that the publication of the Court of Appeal opinion has and will seriously impair Petitioner's good name, reputation, honor and integrity. He has been publicly charged with acts of serious professional misconduct and his integrity and motives have been impugned in nearly every aspect of the case. The published opinion has been circulated among his colleagues, among the judges before whom he appears, among his clients; in a word, throughout Petitioner's professional world. The injury to Petitioner's reputation and career from the publication of Respondent's opinion is incalculable. Criticism of an attorney in a judicial opinion has been described as "a severe sanction". (Witkin, California Procedure, 2nd Ed. Vol. I, p. 195.)

Petitioner has not been accorded due process. He, no less than Mrs. Constantineau, is entitled to the full protection of the due process clause of the Fourteenth Amendment.

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[13] A State Court is, of course, a government agency, and it may not use its power in any manner which contravenes the due process provision of the Fourteenth Amendment. (*New York Times v. Sullivan*, 376 U.S. 254, 265.)

B. The Court of Appeal Has Failed to Afford Petitioner Notice and a Hearing in Accordance With Due Process of Law.

The accusations of misconduct appearing in Respondent Court of Appeal's opinion all involve factual determinations by that Court concerning events to which it was not a percipient witness. Neither do said purported acts of misconduct appear in the record before Respondent Court of Appeal.[14] Under such circumstances, procedural due process requires notice, confrontation, and a full hearing.

> *In re Ruffalo,* 390 U.S. 544, 550-551;
> *Cole v. Arkansas,* 333 U.S. 196, 201;
> *Arthur v. Superior Court,* 62 Cal. 2d 404, 407-408 (1965);
> *Cf. Greene v. McElroy,* 360 U.S. 474.

In the present case, Petitioner has received no hearing. Moreover, as previously noted, the Court of Appeal has utilized and interpreted Declarations submitted by Petitioner and others in reply to the specific charges set forth in the Court's letter of October 8, 1970 as a basis for finding Petitioner guilty of other serious charges of which Petitioner had no knowledge or notice until after the Court of Appeal opinion was issued and published. This, too, contravenes due process. (*In re Ruffalo,* 390 U.S. 544, 550-552.) Still worse, Respondent Court of Appeal has interpreted and construed the Declarations by Petitioner and others, as well as other documents, as if they had been prepared with knowledge of and reference to the charges ultimately made against Petitioner in the published opinion. Such "fact finding" is not only violative of due process, it is also ill-designed to ascertain the truth.

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[14] Indeed, there is substantial uncontroverted evidence in the record before Respondent Court which is directly contrary to the accusations of misconduct made against Petitioner.

C. Petitioner Is Entitled to a Hearing and Public Exoneration.

In the *Petition of Samuel H. Sterling, Esq.* (Colo., 1965) 301 P.2d 346, the Colorado Supreme Court on Attorney Sterling's Petition appointed a referee to conduct a hearing concerning criticism against Mr. Sterling which appeared in a previous opinion of the Colorado Supreme Court. Sterling had not been a party to the earlier action, nor was he then counsel, but he had formerly been counsel of one of the parties. He took exception to the criticism in the Supreme Court's opinion and filed a petition seeking exoneration. A referee was appointed, evidence was introduced which exonerated Mr. Sterling of misconduct, and at the referee's recommendation, the referee's opinion was published by the Court.

Petitioner likewise should be entitled to a hearing and upon a proper showing, to public exoneration. While exoneration will not undo the harm already done to him, it will at least help to minimize the damage and afford Petitioner a basis for rebuilding his professional reputation and his career.

Conclusion.

For the reasons set forth herein, it is respectfully requested that a Writ of Certiorari should be granted. Elementary fairness, due process, and respect for the judicial process itself require that Petitioner should have been given a proper hearing before he was publicly pilloried. It should be ordered that he now be given an opportunity to clear his name.

Respectfully submitted,

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Paul P. Selvin,
Attorneys for Petitioner,
David C. Rust.

Horvitz and Minikes,
Selvin & Cohn,
Of Counsel.

APPENDIX A.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, in and for the Third Appellate District.

Jack Halpin and Max G. Giles, Petitioners, vs. The Superior Court of the State of California, in and for the County of Sacramento, Respondent. 3 Civil No. 12594.

Hyster Company, Petitioner vs. the Superior Court of the State of California, in and for the County of Sacramento, Respondent. 3 Civil No. 12606.

Filed: Jan. 20, 1971.

We issued an order to show cause and a stay order on the two above captioned petitions for mandamus and/or prohibition. The Halpin-Giles petition represents interests antipodal to the Hyster Company ("Hyster") petition but the aim of both was to stay further proceedings in an action pending in the Superior Court of Sacramento County, No. 192553 ("Sacramento action") entitled Douglas Guardian Warehouse ("Warehouse") v. Jack Halpin and Max G. Giles.

The two proceedings have been consolidated. The declared purpose of the Sacramento action was to compel specific performance of an alleged settlement between plaintiff Warehouse, represented by attorney Rust and his firm, on the one hand, and defendant Giles, represented by attorney Halpin (who was also a defendant), on the other hand. The alleged settlement was of a cause of action for personal injuries brought in the Shasta County Superior Court ("Shasta action") by Giles against three defendants of which Warehouse was one and Hyster was another. The trial had been bifurcated. The liability phase was in progress at the time the claimed settlement was said to have been made. Judge Abbe was sitting without a jury to determine the liability of the three defendants. During the progress of this phase Judge Abbe was told of negotiations for a settlement which apparently would be effected between all parties but that an actual settlement had not been consummated. We will explain these negotiations at some length below. The judge recessed the trial for five days.

On the day to which the trial had been continued its progress was resumed. The proposed settlement had been abortive. The reasons for its failure will also be described. All parties were present represented by counsel—including Warehouse represented by Mr. Rust. Outside of court there had been a dispute between Mr. Rust and Mr. Halpin as to whether a settlement between Giles and Warehouse had actually occurred. Judge Abbe was not informed by Mr. Rust or anyone else, either of a completed settlement or of any dispute.

The liability phase of the trial continued as though there had been no interruption. Mr. Rust, with the others, participated in it until its termination. The issue of a settlement was not raised. A determination was made by Judge Abbe that two defendants, Hyster and Warehouse, were liable as joint tortfeasors. Even when that decision was made there was no claim by Mr. Rust of any settlement.

Meanwhile, the damage phase of the trial was set to be heard before a jury in the Shasta action. That was the posture of the case when the Sacramento action was filed.

The verified complaint filed by Warehouse in the Sacramento action alleged a separate good faith settlement solely between plaintiff Giles and Warehouse. Both Giles and Halpin were named as defendants and, as stated, they were the only defendants. It was *not* alleged that Mr. Rust, representing Warehouse, had participated in that phase of the trial. On the contrary, it was falsely alleged that the court in the Shasta action had been informed of the settlement and that the court had "excused" Warehouse and Mr. Rust from further participation in the trial. (It was not explained how the court nevertheless thereafter found Warehouse liable with Hyster as joint tortfeasors.) The complaint prayed for specific performance of the alleged agreement and for an injunction to be issued against defendants prohibiting them from further participation in the Shasta action against Warehouse.

There is another curious circumstance which we will advert to in greater depth below. Before Giles and/or Halpin appeared in the Sacramento action an agreement in writing between Halpin and Rust had been secretly reached respecting a possible limit to be given any judgment which might be rendered in the Sacramento action in favor of Warehouse and against Giles and Halpin.

Nevertheless, under the state of affairs described above, the Sacramento County Superior Court assumed jurisdiction. Also, after a hearing lasting less than two hours which, it was stipulated by the parties, was to be a trial on the merits, *except that it was not necesssarily to be binding*, the court issued an injunction enjoining Giles and Halpin from further participation in the Shasta action as against Warehouse.

We will explain below the events which followed this strange maneuvering. It will be sufficient to say here that the Shasta action proceeded through the damage phase and to judgment (more or less at the telephoned suggestion of the Sacramento County Superior Court judge), tentative findings against Giles and Halpin were prepared in the Sacramento action, defendant Hyster of the Shasta action sought to appear specially to attack the jurisdiction of the Sacramento County Superior Court, objections to the findings were filed by Giles and Halpin, hearings were held in December 1969. In February 1970 the Sacramento County Superior Court decided that Hyster was not entitled to any hearing on the validity of a settlement to which the court nevertheless found Hyster to have been a party, and the Sacramento court signed findings (outside the issues framed by the pleadings). At that point these proceedings were brought.

The facts stated above require that a peremptory writ issue. This court believes, however, that those facts should be augmented so that the reasons for the rulings hereinafter to be made will be clarified.

THE FACTS AUGMENTED

When this court, after an initial study of the written presentation of the parties and after hearing the oral argument, commenced to study the materials before it and the transcription of the oral argument, it found hopeless contradictions between representations made by the several parties. It therefore asked explanation. Five supplementary letter briefs and five separate affidavits (or declarations under penalty of perjury) were submitted. The affidavits (although clarifying certain matters as to which this court had gained a misunderstanding) are not only contradictory as between the parties, one of them is self-contradictory. On the record before us we are critical of behavior of certain counsel as officers of the court. We will, however, in the main, let the facts speak for themselves and we shall attempt to give as concise an account as the nature of this matter will permit.

January 25, 1968. Max G. Giles, represented by Halpin as attorney, filed as plaintiff a complaint in the Shasta County Superior Court naming Warehouse, Plywood Redding, Inc., and a number of Doe defendants of which Hyster was later served as one. Giles sought $500,000 in damages for injuries suffered while operating a forklift manufactured and owned by Hyster ~~and leased to Gold-Rey~~ Plywood Sales, Inc. The latter was Giles' employer. Gold-Rey (not a defendant) filed a complaint in intervention. The status of Plywood Redding, Inc., is unimportant.

March 11, 1969. The trial of the liability phase of the trial (theretofore ordered to be bifurcated) was commenced before Judge Abbe sitting without a jury.

Friday, March 14, 1969. It was declared in open court that a tentative settlement agreement had been reached. We have the transcript of the court proceedings on that day before us. These proceedings do not, as attorney Rust now insists, show or indicate any completed settlement of Giles with Warehouse or of Giles with anyone else. They do show that attorney Halpin stated, "we think we have got the case settled, but there are some technicalities to worry over. . . ." There is a statement: "MR. RUST . . . it will not be necessary for me to be back here" and thereafter there was a colloquy between court and counsel to the effect that *should the tentative settlement be concluded no one would have to come back.* The tenor of the whole discussion, however, was that the actual settlement was tentative and the court ordered a recess with the trial to be continued in the event it failed.

March 13-19, 1969. there are varying accounts of what happened during the settlement negotiations. (It should be noted here—out of chronological order—that later a member of Mr. Rust's firm was to propose, and ultimately the Sacramento County Superior Court was to find, that the actual settlement entered into was one between Giles on the one hand and ALL defendants, plus the complainant in intervention.)

Attorney George Littlefield was the attorney representing Gold-Rey's compensation carrier, Employer's Mutual Liability Insurance Company of Wisconsin ("Employer's Mutual"). In the proceedings now before us a declaration was solicited from him by *both Mr. Rust* and Mr. Halpin as to Littlefield's version of what had taken place during settlement negotiations after the court recessed and before it reconvened. He has filed this declaration dated October 23, 1970. It shows in relevant part that Littlefield had received authority from Employer's Mutual and Gold-Rey to contribute $50,000 to a " 'package settlement' " offer by Mr. Halpin to settle the case for $225,000. Gold-Rey's contribution was conditioned upon approval by the Workmen's Compensation Appeals Board. Hyster, represented by Mr. Smith, agreed to contribute $125,000. Warehouse, insured by Liberty Mutual had agreed to contribute $25,000. Although this left the total $25,000 short of the demand, Mr. Halpin said he would be willing to reduce the demand to $200,000 and would discuss it with Mr. and Mrs. Giles. Hyster's contribution was conditioned upon Mrs. Giles' approval and signature upon the release. The reason: Both Mr. and Mrs. Giles had been present (off-stage) during negotiations. Giles had been rendered a paraplegic in the accident which was the subject of the action. Mr. Smith (and presumably others) had learned that Mrs. Giles contemplated a dissolution of the marriage. She demanded a part of the settlement moneys. Although a personal injury recovery is ordinarily separate property, the foregoing facts make Mr. Smith's condition a reasonable one. As Mr. Smith expressed it, he did not want his client to suffer substitution of one lawsuit for another. Because the condition could not be met the settlement failed.

Mr. Littlefield's declaration continues: "Thereafter, Mr. Challoner [an insurance company representative], Mr. Halpin, and I proceeded to lunch where we met with Mr. Rust. Mr. Rust was informed by Mr. Halpin and by me that the settlement had 'blown up'." Mr. John Quincy Brown [who represented defendant Plywood Redding, Inc., the third (non-paying) defendant] was also advised as to what had happened.

"*At no time was I led to believe, nor did I believe that Mr. Halpin had offered a piecemeal settlement. In fact, my offer to settle in the sum of $50,000.00 on behalf of my client, was contingent upon the total sum of settlement being accepted as a third party compromise and release before the Workmen's Compensation Appeal* [*sic*] *Board.*" (Italics ours.)

In one part of Mr. Rust's declaration he confirmed the information that he had received *on March 14, 1969*, and the stated reason for it—"because Mr. Giles' wife had threatened divorce and might or would demand part of the settlement." Seemingly inconsistent is his later statement in the same declaration: "It was only after I filed suit in the present action [*filed May 14, 1969*] that I learned for the first time that the Giles-Hyster settlement blew up because Hyster had insisted upon Mr. Giles' signature, . . ."

Halpin's declaration reiterates the statement made by Littlefield that all settlement proposals were for a " 'package settlement' " Halpin also adds a contention that settlement negotiations had "broken down" within one hour after the March 14, 1969, court recess and that Rust was immediately so advised. *Rust had not informed him then of any claim that he considered the settlement binding.* That contention was not made until just prior to the commencement of the renewed (liability) hearing on March 19, 1969. Halpin had replied that he had not negotiated with any defendant individually and repeated his statement that it was a " 'package settlement.' "

The trial judge was not advised that there was any contention by Rust that "he had a valid settlement, and to my [Halpin's] knowledge, Mr. Rust did not advise Judge Abbe that he (Rust) felt that he had a valid settlement before the decision on the liability." (Italics ours.) *This is not disputed by Rust. Nor does Mr. Rust contend that he told Hyster's attorneys of any settlement contention.*

March 19-26, 1969. The case continued on to decision. Rust participated in the liability phase of the trial. On March 26, 1969, Judge Abbe filed his decision. He ruled in favor of Giles and against Hyster and Warehouse and declared that the negligence of each was equal. He ruled in favor of Plywood Redding, Inc., dismissing the case as to it with costs. One the issue raised by complainant in intervention, the employer, Gold-Rey, the court found that it was negligent ". . . and its negligence was a proximate cause of plaintiff's injuries." The damage phase of the bifurcated trial was set for July 1, 1969.

April 7, 1969. Rust wrote a letter to Halpin. In it he said, "I am absolutely totally amazed at the [Shasta County court's] decision, because, frankly, it makes absolutely no sense at all." [Why then Warehouse's $25,000 settlement offer?] Also stated in the letter is the following: "In the light of all this, I have advised my clients that rather than proceed with the enforcement of the settlement, they ought to simply bide their time and then take an appeal. . . ." He proceeded to state that his client had insisted that Rust try to enforce the settlement. Also, he said, in spite of a 20-year long friendship with Halpin, he was going to join him as a defendant. He suggested, however, that if the action were to be brought in Shasta County it might affect the size of any verdict "against Hyster and/or anyone" ("and/or anyone" meant, of course, Warehouse which was the only defendant then remaining in the case besides Hyster). Rust's declaration continues: "This, of course, could seriously prejudice Giles' case with respect to obtaining the ultimate judgment. *In order to avoid all of that I would be willing to file the law suit here in Sacramento County. . . .*"[1] (Italics ours.)

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[1] We have read this letter with some amazement. It is the first instance in the experience of this court that an attorney representing a defendant which had already been found to be a joint tortfeasor but as to whom (and its fellow tortfeasor) no damages had been fixed by a jury has ever expressed a wish, by moving into another county, to keep facts from the jury which would be calculated to keep damages assessed against his client down.

May 14, 1969. Warehouse, through Rust's firm as attorneys, filed an action against Giles and Halpin contending a separate, severable settlement of the Shasta action between Giles and Warehouse for $25,000 in "good faith."

The complaint further alleged: "After the case had been settled as to the plaintiff herein, the settlement was announced to the trial court in open Court and the plaintiff was excused from any further participation in ACTION #37153 [the Shasto action]." The complaint was verified and the statement just quoted was, as this recital of facts above has shown, blatantly and blandly untrue.

Noticeably omitted from the complaint is any concession that there had been no settlement between Giles and Hyster. Also omitted is the fact that Mr. Rust for Warehouse had continued to participate in the Shasta liability trial.

June 16, 1969. Rust wrote another letter to Halpin. The letter states in relevant part: "In light of our discussions wherein you agreed to have the matter heard on the merits on the order to show cause, I hereby agree that in the event that Judge Schaber[2] rules in our favor, and that subsequent thereto on the trial of the [Shasta] action . . . the trial court rules that the holding of Judge Schaber is not binding . . . *I will immediately stipulate to set aside Judge Schaber's judgment* with the understanding, however, that we could then re-try the issue of whether or not our settlement was entered into in good faith." In a second paragraph it is stated, "The purpose of this stipulation is to protect you and your client from having one Court rule that the settlement was entered into in good faith and another Court rule adversely. . . ." (Italics ours.)

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[2] It had been anticipated that Judge Schaber would be the Sacramento trial judge. When the hearing took place Judge Schaber was not available and another judge was substituted in his place.

On the same date Halpin made a general appearance in the Sacramento action by filing a denial of all allegations. It is conceded that, as far as the parties to the Sacramento action were concerned the hearing on the preliminary injunction was to be deemed a hearing on the merits.

June 30, 1969. The Sacramento action was heard. Neither Hyster nor its attorneys had any notice, or knowledge, of the proceedings. There was no court reporter present. Only the declarations (from which we have quoted liberally above) are before us. The hearing lasted less than two hours. The court, on the basis of such evidence, issued a preliminary injunction as prayed for.

July 1, 1969. The jury was called for the commencement of the damage phase of the Shasta action. That morning Judge Abbe received a copy of the preliminary injunction. He telephoned to the judge in the Sacramento action who had issued the injunction. Following is an excerpt of the Sacramento Superior Court's statement of that conversation:

"THE COURT: . . . Judge Abbey [*sic*] called me and he said, 'One of Mr. Rust's associates is here. What shall I do? Shall he participate in the case or shouldn't he participate in the case? What should I do?'

"I know Judge Abbey [*sic*] and I said, 'Well, Judge Abbey [*sic*], if I were in your position I would say you participate in the trial of this case because I am not infallible. I may be wrong. You know, indeed, I may well be wrong, and I just don't want to see your case tried and then have to be retried by virtue of a mistake that I may have made. So I think that you are going to be saving time in the long run to allow this fellow to participate in the trial.' "

December 3, 1969. From the time that the negotiations for settlement had failed on March 14, 1969, until the preliminary injunction had been served on July 1, 1969, neither Hyster nor its attorneys had had any information (1) of Rust's contention that there had been an executed settlement between Warehouse and Giles or (2) that the Sacramento action (in which Hyster had not been made a party or served) had been brought. On December 3 Hyster appeared specially in the Sacramento action to contest jurisdiction.

December 8, 1969. Giles and Halpin filed a notice of motion for an order of dismissal, with a notice of motion for a change of venue to Shasta County, or in the further alternative, a motion to reopen the evidence and take new testimony. Since there had been a stipulation (between Rust and Halpin) that the evidence taken on June 30, 1969, would be considered to have been on the merits, proposed findings of fact had been prepared and objections thereto had been filed.

December 12, 1969. Hearings on all matters described in the preceding paragraph were held in the Sacramento action.

Meanwhile: *July 1-8, 1969.* The damages phase of the Shasta action was held before the court sitting with a jury. The jury assessed plaintiff's damages at $410,000. Halpin appeared. Thomas Tweedy of the firm of Rust, Hoffman and Mills appeared for Warehouse; Rogers Smith of Bledsoe, Smith, Cathcart, Johnson and Rogers appeared for Hyster.

September 16, 1969. After proposed findings had been filed and objections made thereto in the Shasta action, the findings were settled and filed. On the same date judgment was entered in favor of Giles and against Hyster and Warehouse for $383,233.81 ($410,000 less $26,766.19) the amount of compensation which had been paid to July 1, 1969).

September 19, 1969. A notice of motion for a new trial was filed on behalf of Hyster.

September 29, 1969. A notice of motion for a new trial was filed on behalf of Warehouse.

November 14, 1969. The motions for a new trial were denied.

December 3, 1969. Warehouse filed a notice of appeal.

December 10, 1969. Hyster filed a notice of appeal.

These appeals are still pending. Meanwhile, the following proceedings were being held in the Sacramento action:

February 27, 1970. The court in the Sacramento action denied all of the motions and adopted the proposed findings which had been prepared by Thomas Tweedy, a partner of Rust. This court has carefully compared these findings with the pleadings in the Sacramento action. Although Warehouse had alleged in its complaint and in the several declarations of its attorney, Rust had maintained and still maintains that it had a separate settlement with Giles not depending upon nor a part of any settlement negotiations between Giles on the one hand, and Hyster or Gold-Rey on the other,[3] the Tweedy findings adopted by the court find that "there was a contract of settlement and compromise between plaintiff and defendants DOUGLAS-GUARDIAN WAREHOUSE, HYSTER CORPORATION, and intervenor GOLD REY PLYWOODS SALES, INC. in the amount of TWO HUNDRED THOUSAND DOLLARS ($200,000.00) entered into in good faith and for valuable consideration by all parties. It is further found that after the offers of settlement and compromise had been accepted and common, a contract relationship had been created, defendant Hyster Corporation was allowed to withdraw by plaintiff because of reservations said defendant's counsel, Jack Halpin, Hyster Corporation had with respect to the obtaining of plaintiff's wife's release and the possibility of further litigation."

Both Mr. Halpin and Mr. Rust indignantly deny any collusion between them. Each has a reputation for vigorous advocacy in the interests of his clients. No member of this court suspects that the court-shopping adventure had anything to do with a sell-out of a client. The two attorneys were on opposite sides of litigation, however, and while Mr. Halpin may well have been willing to have litigation regarding an alleged settlement between Giles and Warehouse for $25,000 tried in a jurisdiction other than the one where larger damages would be asked from a jury (particularly when Mr. Halpin was protected by the letter from Mr. Rust dated June 16, 1969, which transformed the Sacramento action into a possibly moot proceeding), the reasons for Mr. Rust's altruism as stated in his letter of April 7, 1969, are not so clear. (See fn. 1.) We think the position which Mr. Smith takes in this respect may be more believable—that Mr. Rust was eager that Warehouse be able to shed the haircloth of joint tortfeasor liable with Hyster to pay an equal or equitable share of a verdict thereafter to be fixed in the sum of $383,234.00 and don belatedly instead the mantle of a settler of litigation entitled to a dismissal (at a saving of $166,617.00).

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[3] During the colloquy between the court in the Sacramento County action and counsel on December 12, 1969, Mr. Rust had said: "I didn't have the vaguest notion what really happened [in the negotiations between Halpin and the attorneys for Hyster and Gold-Rey] . . . so far as my rights were concerned."

INADEQUACY OF FINDINGS

The complaint in Sacramento County had, as stated, alleged separate, severable contract of settlement solely between Giles and Warehouse in which neither Hyster nor intervenor Gold-Rey had participated. The findings signed by the court do not conform to the pleadings. They were based upon proposed findings prepared by Mr. Tweedy, a partner of Mr. Rust. They were objected to presumably upon the grounds they are not within the issues framed by the pleadings and also because they are not true. Mr. Tweedy has explained their preparation in a declaration filed with the court. He attests that *his* draft had been prepared with a few changes from a draft prepared by the judge in the Sacramento action. The judge had been impatient with the delay in preparation and had instructed Mr. Tweedy "to draft the Findings in accordance with his thinking as reflected in his draft. That draft as submitted (and amended by Tweedy) is attached to his declaration. We have compared the rough draft with the original. They are quite similar. Both the court and the attorney treat the negotiations and settlement as one "contract" with no unfulfilled conditions precedent or subsequent, a simple offer by Halpin for Giles and acceptance *by Hyster, Gold-Rey and Warehouse.* This contract is treated as if all of the parties, including Warehouse, were privy to all negotiations. That is quite different from the facts as alleged in the complaint which we have outlined, including the representations of Mr. Rust to the court that he did not have "the vaguest notion" of what had transpired in the negotiations by Mr. Halpin with the attorneys for the other parties.

We have noted above that the requirement by Mr. Smith that Mrs. Giles sign the settlement agreement before he would commit his client, Hyster, to pay out $125,000 was "understandable." It was also reasonable. Although Mrs. Giles was neither an actual nor an indispensable party to the Shasta action, she was, once she had disclosed, (1) an impending divorce, (2) that she was going to demand a portion of the settlement moneys and (3) had put the largest—and perhaps all—of the parties to that settlement on notice of her claim, a significant party to the settlement. Anyone paying large sums of money to her husband under those circumstances would be very unwise indeed, and any lawyer who would not advise his client, as Mr. Smith had done, that he would probably be settling one lawsuit only to face another, would be guilty of giving extremely bad advice.

There was, therefore, *not* the simple offer and acceptance with a clear "meeting of the minds" which the court in the Sacramento action seems to feel, after a very brief hearing, was here involved. The question of when and under what circumstances a mutual assent occurs is (despite its fundamental nature in contract law) an exceedingly complex one. (See, e.g., 1 Witkin, Summary of Cal. Law, Contracts, § 30 et seq., p. 39 et seq.) This opinion need not analyze those complexities. It is sufficient to say that the complaint had pleaded a separate contract between *two* parties and that the court found a different contract between *four* parties (two of whom were not before the court, one of those two not being permitted to participate in the proceedings).

THE EFFECT OF CALIFORNIA'S JOINT TORTFEASOR CONTRIBUTION STATUTE.

The Legislature in 1957 (Stats, 1957, ch. 1700) adopted the Releases From and Contribution Among Joint Tortfeasors statute. (Code Civ. Proc., §§875-880.) These sections provide in material part and in effect that where a money judgment has been rendered jointly against two or more defendants in a tort action there shall be a right of contribution among them (§875, subd.(a)) *to be administred in accordance with the principles of equity* (§875, subd. (b)). Such right of contribution may be enforced only after one tortfeasor has, by payment discharged the joint judgment or has paid more than his pro rata share thereof—in which case the right of contribution shall be limited to the excess (§875, subd.(c)). "Pro rata" is to be determined by dividing the judgment equally among all of them (§876, subd.(a)). Section 877 provides for a release from such liability where a release, dismissal or covenant not to sue has been "given in good faith *before verdict or judgment* to one or more of a number of tortfeasors *claimed* to be liable for the same tort."[4] (Italics ours.)

The contribution statute takes consideration of issues arising both before and after liability and damages have been established. It does not expressly discuss the bifurcated trial with situations which will arise after liability has been established but before damages have been assessed. We have no doubt, however, that the Legislature intended by the statute a comprehensive scheme of contribution between joint tortfeasors (after they have been judicially declared to be such), and intended that scheme to be operative in a bifurcated trial situation as well as in the conventional single trial.

Of the contribution statute provisions, Code of Civil Procedure section 877 is particularly apposite, and the following conclusions inevitably flow from the legislative language: that after a determination of joint tortfeasor liability no defendant is one against whom there is a mere "claim of liability." Liability has become established. Secondly, the words of the section

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[4] Section 877 goes on to provide: "(a) It shall not discharge any other such tortfeasor from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it whichever is the greater; and

"(b) It shall discharge the tortfeasor to whom it is given from all liability for any contribution to any other tortfeasors."

"before verdict or judgment" must be construed to mean: "before establishment of liability," with "verdict" equated with such liability determination. A settlement between the plaintiff and a tortfeasor whose joint liability has been established is not one within the meaning of that section, and thus cannot effectively deprive the remaining tortfeasors of their rights to contribution.

A principal reason why that interpretation seems inevitable is this: Were the rule to be established otherwise, there would unquestionably occur concurrently with the determination of joint liability a mad rush by one or more of the joint tortfeasors in an effort to settle and to obtain a release, thus thwarting the provisions of the contribution statute and the right of the other joint tortfeasors to obtain contribution from the settlers. A complete breakdown of (1) bifurcation of trials and (2) the operation of the contribution statute's provisions would follow. Both of these modern processes are notably progressive advances towards the more efficient disposition of litigation.

Nothing herein contained is intended to, or should be, construed to hinder settlement and termination of litigation between plaintiffs and individual defendants *inter sese,* or settlements and termination of law suits between plaintiffs and some but not all defendants before liability among joint tortfeasors has been determined. But once such liability *has* been determined against all defendants jointly liable, then the provisions of the contribution statute within the obvious interest of the Legislature must be heeded.[5]

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[5] Thornton v. Luce (1962) 209 Cal.App.2d 542, 550-552 (hear. den.), held that no right to contribuiton exists prior to

(This footnote is continued on next page)

Since the contribution statute, and particularly section 877 thereof, is applicable, all defendants had become "'persons whose interests, rights, or duties will inevitably be affected by any decree which can be rendered in the action'" must be joined, and the failure to obtain personal jurisdiction over such parties deprives the court of subject matter jurisdiction. It has been said, "The court . . . cannot even proceed as to . . . [parties over whom it has personal jurisdiction] unless the absent parties are brought in. . . ." (1 Witkin, Cal. Proc. 2d, Jurisdiction, §66, p. 588, and see cases there cited; Code Civ. Proc., §389.)

The rule cuts deeper than the findings made by the court in the Sacramento action. It would prevent any findings by that court.

THE EFFECT OF ONE SUPERIOR COURT SNATCHING JURISDICTION FROM ANOTHER WHICH ALREADY HAD JURISDICTION OVER BOTH SUBJECT MATTER AND ALL PARTIES AND WHICH IS IN MIDTRIAL.

Under this caption we will discuss the question of the jurisdiction of the court in the Sacramento action *wholly regardless of the provisions of the contribution statute.*

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entry of a joint money judgment. The case is distinguishable. It involved a single trial at which both liability and damages were to be determined. The settlement therein was executed prior to an adjudication of the "*common liability*". (original italics) which the right to contribution presupposes and noted that "potental liability" as joint tortfeasors is an insufficient basis for removing from a plaintiff the right to control his case. Actually the reasoning of the *Thornton* case, when applied to the facts of the case at bench, supports the conclusion of this court that once the existence of joint liability has been found, the inchoate rights to contribution among those responsible may not be terminated by the plaintiff acting in concert with less than all such defendants.

At the time Warehouse induced the court in Sacramento to assume jurisdiction in an action by one of the parties to the Shasta action, Warehouse, against another, Giles,[6] both parties were midway in the trial of the latter action. The Shasta County Superior Court had both subject matter jurisdiction and jurisdiction in personam. In all of the arguments which have been made herein it has never been contended that Warehouse could not have raised the same contentions in Shasta County that were raised in Sacramento. The only asserted reason for attempting to take the issue away from Shasta County was a belief (shared or unshared between the attorneys concerned —it makes no difference) that at that stage factors extraneous to *any* issue to be tried could conceivably affect the jury's generosity. Fortunately, for the orderly administration of justice, that is not a valid reason to interrupt a trial.

The rule is settled that even when two superior courts have concurrent jurisdiction over the subject matter and parties involved in litigation, the first to assume jurisdiction has exclusive and continuing jurisdiction over the subject matter and all parties involved until such time as all necessarily related matters have been resolved. (Stearns v. Los Angeles City School Dist. (1966) 244 Cal.App.2d 696, 708-716; Cade v. Superior Court (1961) 191 Cal.App.2d 554, 559; M. H. Golden etc. Co. v. Superior Court (1950) 98 Cal.App.2d 811, 815-816; Myers v. Superior Court (1946) 75 Cal.App.2d 925-929; Gorman v. Superior

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[6] Halpin was neither an indispensable nor a proper party. There was no conflict of interest between Halpin and his client, Giles. If a contract had existed, it was Giles' contract, not Halpin's. Halpin had never stepped beyond his role as an attorney.

Court (1937) 23 Cal.App.2d 173, 177-178; 1 Witkin, Cal. Proc. 2d, Jurisdiction, §290, p. 830.)

It is true that the cases cited present various facts and facts quite different from those here involved. The validity of the rule was present in all and is present in the instant case. Its general applicability is well illustrated by the facts of this case. Consider the effect of the procedure attempted here. Assume that which we are far from conceding—that Warehouse had a contention possessing arguable merit. If the law can properly allow what occurred here, then we will have at best (1) a half-trial and determination of liability; (2) a transfer to another jurisdiction and a determination of non-liability; (3) an appeal from the determination of liability; (4) an appeal from the determination of non-liability; (5) either a postponement of the issue of damages in the first trial pending the trial and appeal of the second action, or (6) a disregard of the second action with almost infinite time-wasting possibilities.

When, in connection with all this, we consider the crowded condition of the courts, the fact that our entire judicial system is facing sharp criticism for the creaking obsolescence of some of its procedural anachronisms, toleration of the acts attempted here would constitute sheer idiocy.

We have stated above that we are far from conceding that Warehouse ever had a settlement or that its contention possessed even arguable merit. Many things point to the fact that Warehouse did not even urge the settlement in good faith. We have noted the allegation in its complaint that it had informed the court in the Shasta action of a settlement and that it had been "excused" from further participation in that action. We have also noted that that statement is false; that all the court in the Shasta action had been told was that a *tentative* settlement was being negotiated.

Also we have noted how the court in the Sacramento action was asked to and did find *that all of the defendants* had settled the Shasta action. Had that been done why did not Rust notify the Shasta County trial judge under rule 226, California Rules of Court? That section provides: "Whenever a case set for trial has been settled, the attorneys or parties appearing in person shall immediately notify the court thereof. Failure to do so may be deemed an unlawful interference with the proceedings of the court."

Since Warehouse had an opportunity to raise its alleged settlement of the Shasta action No. 37153 and spurned that opportunity until after that court had determined Warehouse's joint tortfeasor liability, its right to raise it now is gone; (1) by waiver, should the Shasta action be affirmed on appeal; (2) by the statute of limitations, should the case be set at large by reversal on appeal.

It is ordered that a peremptory writ shall issue prohibiting the Superior Court of Sacramento County from entering judgment in action No. 192553. Its preliminary injunction heretofore issued is dissolved. Both petitioners shall recover costs from Douglas Guardian Warehouse.

Pierce, *P. J.*

We concur:

Regan, *J.*
Bray, *J. Assigned*

Modification of Opinion.

In the Court of Appeal of the State of California, in and for the Third Appellate District.

Jack Halpin and Max G. Giles, Petitioners, vs. the Superior Court of the State of California, in and for the County of Sacramento, Respondent. 3 Civil No. 12594.

Filed: Feb. 2, 1971.

BY THE COURT:

The typewritten opinion of this court in the above entitled cases filed January 20, 1971, is modified as follows:

On page 17, at the end of line one, delete the quotation marks at the end of the omissions and add the following to the quotation: "It is further found that after the offers of settlement and compromise had been accepted and, accordingly a contract relationship had been created, defendant HYSTER CORPORATION was allowed to withdraw by plaintiff because of reservations said defendants' counsel, JACK HALPIN, and HYSTER CORPORATION had with respect to the obtaining of plaintiff's wife's release and the possibility of further litigation."

APPENDIX B.

In the Court of Appeal of the State of California, in and for the Third Appellate District.

Jack Halpin and Max G. Giles, Petitioners, v. the Superior Court of the State of California, in and for the County of Sacramento, Respondent. 3 Civil 12594.

Hyster Company, Petitioner, v. the Superior Court of the State of California, in and for the County of Sacramento, Respondent. 3 Civil 12606. (Consolidated Cases.)

Filed: Feb. 17, 1971.

BY THE COURT:

David Rust as an individual has applied to this court for a rehearing of the court's decision in the above entitled matters filed January 20, 1971. (The opinion was modified on the court's own motion on February 2, 1971.) The basis of Mr. Rust's application is that he is a "party aggrieved" because, in the court's written opinion, it had occasion to comment on Mr. Rust's conduct as an attorney for one of the parties, Douglas Guardian Warehouse Company (referred to in the opinion and herein as "Warehouse"). Mr. Rust's first contention is that whenever a reviewing court has occasion to criticize an attorney for one of the parties for misbehavior in a matter under review, the court should give notice to the attorney about to be criticized, and the attorney should have a constitutional right to present evidence in his own defense before the opinion is issued: that the constitutional guarantee of due process and "fair play" so demands. Therefore when such procedure is not adopted a rehearing must be granted. No rule of law so provides. The cases cited by Mr.

Rust do not support his position. Were this court to adopt such a rule, litigation already far too long drawn out (generally, and in this matter particularly, *because* of conduct by Mr. Rust which this court deemed, and still deems, to have been inexcusable) would be interminable. No constitutional right of Mr. Rust has been violated, he is not entitled to a new or separate trial on the matter and we so rule.

This and other reviewing courts have had the unpleasant duty many times (1) in criminal matters to find that trial or appellate counsel has been inadequate and (2) in civil and criminal cases to find that an attorney representing one or more of the parties has been guilty of misconduct or misbehavior or of professional misconduct by misrepresentation in violation of Business and Professions Code section 6068, subdivisions (b), (c), (d) and (g).

On the other hand litigants and their attorneys correlatively have the right to expect from a reviewing court and a reviewing court has a solemn obligation to state only facts supported by a record before it, to make no statements unsupported by those facts and certainly to make no statements concerning an attorney of the type mentioned above unless such charges are clearly supported by the record. In his petition Mr. Rust not only accuses this court of having violated the obligation thus owed to him as an attorney but states that "the greater part of the Court's opinion is devoted" to that purpose.

It would be a frightful and truly frightening thing if a reviewing court should actually devote its undoubted power to castigate an attorney whose sole activity was to furnish vigorous but ethical representation of his client. Such a course would be a blight on the administration of justice just as unforgiveable (perhaps even more so) as for an attorney to stray from the paths of rectitude.

Thus, we have examined and reexamined the record before us with the greatest care to insure that in our filed opinion this court has not misjudged Mr. Rust. We do not think that we have. Also we wish emphatically to note that in our filed opinion this court was not "trying" Mr. Rust. It was attempting to set forth the facts of a most peculiar proceeding in chronological order as we interpreted the record disclosing those facts. We note further that nearly every fact stated is documented by written evidence either furnished to use in the form of declarations by Mr. Rust himself or submitted in declarations filed with this court at the instance of Mr. Rust.

THE VERIFIED ASSERTION THAT JUDGE ABBE EXCUSED WAREHOUSE FROM FURTHER PARTICIPATION IN THE LIABILITY PHASE OF THE TRIAL.

We proceed through the filed opinion and the first collision course occurs when we compare it with Mr. Rust's petition in which he states that we have wrongly accused him of having dissembled in making the following statement: "After the case had been settled as to the plaintiff herein, the settlement was announced to the trial court in open Court and the plaintiff was excused from any further participation in ACTION #37153 [the Shasta action]." (That statement is quoted from the last three lines of paragraph VII of the verified complaint of Warehouse in the Sacramento action.)

Since only a trial court is authorized to excuse a party from participating in a trial, and then only in the event of a settlement or some other termination of the case as to that party, the *only* meaning which the quoted sentence can convey and which we are sure it was intended to convey is that the trial court, having found the case settled as between the plaintiff and Warehouse, thereafter excused Warehouse (and, of course, its attorney, Mr. Rust) from further participation in the trial. That was not true.

As an "explanation" of the statement Mr. Rust furnished this Court in his petition (at p. 17) (also as an exhibit to his responsive pleading herein) an excerpt from the transcript on the day when the parties *thought* they had a settlement and when a recess was taken for the purpose of working out the details of its completion. In that excerpt, Mr. Halpin did state at one point, "we have it settled, but there are some problems in exactly how we go about presenting findings, and so forth . . . because . . . well I won't go into that now." Earlier, as a part of the same colloquy, Mr. Halpin stated: "[W]e *think* we have got the case settled. . . ." (Italics ours.) The court *at no time* excused Warehouse, Mr. Rust or any other party or attorney from further participation. The judge did say: "[T]he record will indicate *apparently* the case is settled, but the matter will be continued *for further proceedings* on Wednesday of March 19th at 9:30 a.m." (Italics ours.)

That was not an order excusing Warehouse from further participation and bears no resemblance to one. On page 16 of his petition Mr. Rust—who in his return was, as stated, relying upon this excerpt as his reason for making the allegation we have quoted above in the complaint in the Sacramento action—points out that the transcript referred to a matter "off the record." It did. But a court order excusing a party from further participation in a lawsuit would not be made off the record. *At no time in these proceedings has Mr. Rust ever so contended.*

SIGNIFICANCE OF THE MISREPRESENTATION.

Mr. Rust is persuasive. He persuaded two judges of the Sacramento Superior Court that Judge Abbe had first excused Warehouse from further participation in the Shasta action and that Judge Abbe had then changed his mind and had required them to appear. Nothing of that sort had happened.

Attached to his petition in the declaration of Judge Schaber is the statement (at p. 10) that both Mr. Rust and Mr. Halpin told Judge Schaber "that the action was being brought in Sacramento County rather than in Shasta County by agreement between his office and Mr. Halpin so that information concerning the possible settlement would not become known and improperly prejudice Mr. Halpin or his client." That may have been Mr. Halpin's reason but we are not willing to accept the fact that it was Mr. Rust's reason despite his further assertion in his petition (at p. 31): "*To have thus prejudiced Mr. Giles' case assuredly would have been unfair and would have bordered on sharp practices.*" (Original italics.) Mr. Rust had not informed either of the Sacramento judges that, in coming to Sacramento, neither the Shasta court nor Mr. Rogers Smith, representing Hyster had been told that a separate action was being brought in which Hyster was interested and in which it was, as we will demonstrate, a necessary party.

Wholly irrespective of the Joint Tortfeasors Contribution Statute, Hyster was, we repeat, interested in, and a necessary party to, the determination of the controversy between Giles and Warehouse. Particularly was this true *after* the court had fixed the liability of Warehouse and Hyster jointly. And it will be remembered that the Sacramento action was not filed until after that liability had been fixed. This is a matter of hornbook law and simple arithmetic.

The Shasta action was between Giles as plaintiff and Hyster and Warehouse as defendants. If, as the trial court in the Shasta action had found when Mr. Rust came to Sacramento, Hyster and Warehouse were liable as joint tortfeasors, then each was liable for the whole of any damages awarded and would be so liable until the total judgment had been satisfied. If, on the other hand, a completed settlement in good faith had been accomplished between Giles and Warehouse before the liability had been fixed, then Warehouse was entitled to a release and discharge from the action (upon payment of the amount of the release, $25,000) *leaving Hyster solely obligated to pay the whole judgment.*

Let us turn to the simple arithmetic. The total damages awarded were $383,233.81 ($410,000 less $26,766.19, the amount of compensation benefits paid). If Mr. Rust in a court where Hyster was not a party and where Hyster's attorney was kept in ignorance of the very existence of such action, could establish the settlement, he would have saved his client, Warehouse, the difference between a joint judgment against Warehouse and Hyster for $383,233.81 and a judgment of only $25,000 against Warehouse.

(Of course, no one could foretell even after joint liability had been fixed that damages would exceed $383,000. But Mr. Rust knew that Mr. Giles had suffered paraplegia by the accident, and Mr. Rust is not inexperienced with recoveries in such cases. If the damages anticipated were not the amount fixed, substitute any other probable amount. The rule is the same. The reason for Mr. Rust's move is likewise the same.)

For an unexplained reason the Sacramento court nevertheless insisted (and still insists) that Hyster's rights were not affected. It is mistaken. Mr. Rust fought the attempt of Hyster (represented by Mr. Rogers Smith) to present evidence as to the nonexistence of any settlement. The full argument before the Sacramento court is attached as an exhibit to the Warehouse return herein.

The question may fairly be asked, why did Mr. Halpin consent to this move? One reason could be that Mr. Halpin might indeed be interested in the issue of a settlement being tried in a jurisdiction where the publicity of a claim of a $25,000 settlement as to one of two joint tortfeasors would not reach the jury and perhaps keep the award of damages down. Secondly, he was protected by a letter from Mr. Rust dated June 16, 1969, and marked "Personal and Confidential" where under a certain condition the judgment of the court in the Sacramento action should it be against Mr. Giles was not to be binding. (A copy of that letter was submitted to this Court.) The condition was that it would not be res judicata if the court in the Shasta action would assume jurisdiction to retry the issues. Mr. Rust was gambling that it would not; Mr. Halpin was betting that it would. Both were playing games with the judicial process. As we said in our opinion, neither attorney was properly acting as an officer of the court in trying to turn our superior courts into moot courts.

EFFECT ON THE TAXPAYERS.

A factor which Mr. Rust and Mr. Halpin both seem to have ignored is the effect of their "court-hopping" on the public fisc. We have explained that in the Shasta court all parties were before the court and that court had subject matter and *in* personam jurisdiction. In fact, as we have pointed out, it was the only court which did. The issue as to whether there was or was not a settlement could have been resolved by Judge Abbe after a short hearing. (The Sacramento hearing lasted less than two hours.) Yet these attorneys for some reason proposed a probably moot court action in Sacramento and a second action in Shasta County. When we say "probably" we understate the case. Assuming Hyster's liability to Giles for some large sum (it having evaluated its exposure at $125,000 for settlement purposes), it would have been certain to challenge the validity of Warehouse's claim of settlement, and it was certain to be entitled to its day in court (as a matter, by the way, of due process). The courts are too busy to countenance duplication of actions.

THE CONTRACT SUED UPON WAS NOT THE CONTRACT FOUND. WITH THE AID OF MR. RUST THE COURT DEPARTED FROM THE PLEADINGS TO FIND THERE WAS NO SEPARATE SETTLEMENT.

The contract pleaded was a completed contract of settlement solely between Mr. Giles and Warehouse. It was alleged to be separate and apart from any negotiations between Mr. Giles, on the one hand, and Hyster and Gold Rey (a complainant in intervention), on the other. (See paragraph VII of the verified complaint.)

Mr. Rust had not only pleaded, but in statements to the Sacramento court he had asserted, that since he did not participate in any negotiations in which the other parties were present, he did not know whether any completed settlement had occurred between them or not. We quote from the transcript in the Sacramento action on December 12, 1969. Mr. Rust is speaking: "[T]he guy, so far as I knew that told what happened [in the separate settlement conference between Mr. Halpin and the attorneys for the other parties] was Littlefield. *I didn't have the vaguest notion what really happened over there so far as my rights were concerned.*" (Italics ours.) None of the other participants in the settlement negotiations were parties in the Sacramento action. The trial court found, nevertheless, in findings which were prepared by a member of Mr. Rust's firm and read by him, that the settlement was not a two party one but was between four parties of which one of the four parties (to the agreement but not to the Sacramento lawsuit because that party was not allowed to appear) was excused.

The circumstances of the making of the findings (which have been stated in this opinion but which we will repeat) were these: After the preliminary injunction was issued on the day before the commencement of the damage trial in the Shasta action a copy thereof was sent to Redding. This, according to Mr Smith (and it has never been denied by Mr. Rust) was the first notice that a Sacramento action was ever pending or that a completed settlement was ever claimed.

It had been stipulated between Mr. Rust and Mr. Halpin that the evidence taken in the unreported less-than-two-hour hearing was to be final and that meant that findings were to be prepared. There was a delay in the making of findings. Because of the delay the court handed rough draft notes for findings to Mr. Tweedy, Mr. Rust's partner. Tweedy made a proposed set of findings with minimal alterations. The findings were read by Mr. Rust and were submitted to the court. The findings prepared describe a contract *quite foreign to the contract pleaded.* The essence of the contract found was one between Mr. Giles, on the one hand, and Warehouse, Hyster and Gold Rey, on the other. It was said to provide for a complete settlement *with no conditions either precedent or subsequent* but one from which Hyster, according to the findings, was permitted to withdraw. (Nothing more was said about the status of Gold Rey.)

Above, Mr. Rust has referred to a Mr. Littlefield as the "guy" who was the only one who knew about the settlement negotiations between Mr. Halpin and the attorneys for parties other than Warehouse.

This court has been accused of creating a contract without taking evidence. We have created no contract. We have, however, considered the basis for the findings signed by the court. Since we had noted Mr. Rust's statement above proclaiming Mr. Littlefield to be the witness who told what happened (in the conferences involving Mr. Halpin and the other defendants) and since we received in the mail a declaration from Mr. Littlefield dated October 23, 1970, attached to which was a letter dated October 28, 1970, which says "*Both Mr. Rust and Mr. Halpin requested that I prepare a Declaration for my signature in the above-entitled matter*"—*and since neither Mr. Rust nor Mr. Halpin have ever disclaimed the fact that the declaration was submitted at their request,* we have assumed that fact to be true. Therefore we quoted liberally from Mr. Littlefield's declaration in our opinion. We have been accused (Pet. pp. 24-26) either of stating Mr. Littlefield's declaration out of context or not having reported enough of it. It is not necessary, we think, to repeat it all in the body of this opinion. Mr. Littlefield said that he represented Employers Mutual, the compensation carrier of Giles' employer, Gold Rey. All the material was available and corroborated from other sources. We have included as much in the filed opinion (on pp. 8-9) as seemed necessary.

Mr. Littlefield's declaration brings us up to the negotiations for settlement (in which he participated) on March ~~14th~~ during the mid-morning recess: There had been a private meeting between Mr. Halpin and Mr. Smith. He, Mr. Littlefield, says: "I was not present during this meeting." (Mr. Rust has informed us in his verified pleading he was not present either.) Apparently the meeting was solely between Mr. Halpin and Mr. Smith. After the mid-morning recess and when the trial resumed, Mr. Halpin "informed all interested parties . . . as a result of his discussion with Mr. Smith we could consider the matter settled." *But Mr. Halpin hads also informed everyone "that he wished to discuss it with his client Mr. Giles and Mr. Giles' wife.*

"Thereafter, Mr. Halpin [had] talked briefly with Mr. and Mrs. Giles. Their conversation was not in my presence although I could see them at the end of the hallway of the Courthouse."

Next, Littlefield accompanied by a Mr. Challoner (who was a representative of Employers Mutual) met with Mr. Rogers Smith at the office of attorney Coshow (with whom Mr. Smith was apparently associated representing Hyster). They returned to the courthouse. Mr. Halpin had another conversation outside the courthouse with Mr. and Mrs. Giles. The lawyers returned to Mr. Coshow's office. Mr. Halpin, Mr. Littlefield said, informed "Mr. Challoner and me that Mrs. Giles was unhappy and would not sign any closing papers. This information was given to Mr. Smith. Mr. Smith informed Mr. Halpin in my presence and that of Mr. Challoner that there could be no settlement unless Mrs. Giles agreed to it."

Mr. Challoner, Mr. Halpin and Mr. Littlefield proceed to lunch. "Mr. Rust was informed by Mr. Halpin and by me that the settlement had 'blown up.' Mr. John Quincy Brown was also advised as to what had happened." (It is at this point that the declaration contains the statement set forth in our filed opinion (see typewritten opinion p. 9).)

Mr. Rust's petition states: "Thus, Mr. Littlefield's Declaration does not support the determination that Hyster at all times demanded Mrs. Giles' signature." (Pet. p. 25.) We think it does.

The rest of Mr. Littlefield's declaration has either been referred to in the opinion of this court or is deemed unimportant to the decision.

On May 15, 1970, Mr. Rust filed a declaration with this court. In no part of that affidavit is there any allegation of a separate and severable settlement, or a discussion of one, between Mr. Rust and Mr. Halpin.[1] Yet it seems to be intended to be a report of every step in the proceedings.

On October 23, 1970, Mr. Rust made another declaration to this court. The only reference to what happened in his negotiations for settlement between Mr. Halpin and himself is set forth on pages 6 and 7. It contains no statement that there ever had been a *completed*[2] settlement between the two. It says that

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[1] We have already shown that Mr. Rust in his verified complaint had stated that he had a separate completed settlement contract. (See paragraph VII of the complaint.) It alleges: "During the course of the negotiation, HALPIN, on behalf of his client GILES, offered to settle and dismiss [the Shasta action] to the plaintiff herein [Warhequse] if [Warehouse] would immediately agree to pay $25,000 for said dismissal . . . that the plaintiff herein [Warehouse] did in fact immediately thereafter . . . obtain authority to, and did offer to pay $25,000 . . . and that said sum was accepted by the defendants [Giles and Halpin] as a settlement . . . insofar as it related to the interests of [Warehouse]."

"[N]egotiations were still continuing between [Giles and Halpin] as to the settlement conditions which would have to be agreed upon with respect to HYSTER COMPANY, the compensation carrier, and [Halpin and Giles], however, plaintiff herein did not participate in those settlement discussions as to the settlement as to the plaintiff herein was not conditioned on any of the final arrangements between HALPIN, GILES, the HYSTER COMPANY, and the compensation carrier."

[2] That it may be very clear we point out an important distinction in the interpretations which are possible of any conversations between Mr. Rust and Mr. Halpin regarding a settlement. Mr. Halpin wanted $225,000, later reduced to $200,000. In his

(This footnote is continued on next page)

Mr. Halpin asked him how soon Mr. Rust could have a draft for $25,000; that Mr. Rust then called his claims manager who indicated it could be ready the following Monday "if we had a signed dismissal. Thereafter Mr. Halpin advised me that he, Mr. Smith and Mr. Littlefield were going over to Mr. Coshow's office to draft up some settlement papers." (Reference was then made to other litigation.) Mr. Rust had left the courthouse on March 14th satisfied that the case had been settled. But part of the declaration alleges that "*the fundamental controversy between Mr. Giles and* [*Warehouse*] . . . [*was*] *whether the settlement with* [*Warehouse*] *was severable.* . . ." (Italics ours.) (Cf., fn.1 and fn.2, pp. 14-15).

The findings prepared first in rough draft by the Sacramento court, then by Mr. Tweedy, then argued, then finally signed tell a wholly different story. They reject the idea of any severable completed settlement agreement. A total binding agreement *between all parties to the lawsuit* is said to have existed which failed—for reasons which must now be abundantly

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negotiations with Mr. Rust the two *might* have agreed to a completed settlement under which Mr. Rust was to pay $25,000 for a present release and dismissal of the action regardless of whether Mr. Halpin ever received for Mr. Giles the rest of the $200,000 (as Mr. Rust pleaded in a verified complaint), *or* any conversations between Mr. Rust and Mr. Halpin were susceptible to the interpretation that there was a package deal—that Mr. Halpin, if he got $175,000 from the other parties, Hyster and Gold Rey, would accept the balance of $25,000 from Mr. Rust. That was what the court found. That was what Mr. Rust proposed that it find. The court also found, and Mr. Rust proposed that it find, that the package deal had taken place; that the other parties *had* agreed to contribute the $175,000 necessary to complete a binding agreement. That agreement *did not* take place. Mr. Littlefield, representing Gold Rey, said it did not take place. Mr. Smith, representing Hyster, tried to say that it did not take place but was not permitted to testify by the Sacramento court. Mr. Rust has now declared to us that he, himself, did not know whether such an agreement had taken place or not.

clear. (See fn. 2, p. 15.) In fact when the documentary evidence is analyzed there is little doubt as to just what did happen on March 14, 1969. Those events do not include a settlement. But, as this court has stated in its filed opinion, it is an issue which we did not have to resolve. We deal with the issue at length here only because we have been accused of misstating facts to represent Mr. Rust in an unfavorable light. By extensive documentation we suggest that Mr. Rust's activities speak for themselves.

THE JUDGES

This Court has not intended to, and it does not believe that it has, impunged the motives or belittled in any way our brothers on the superior court bench who have participated in these proceedings. If we have done so unintentionally, we are sorry. We have disagreed with one of them and, as the discussion above has made very clear, we have ascribed to Mr. Rust (and to some extent Mr. Halpin) conduct inconsonant with the best traditions of the California Bar—both Mr. Rust and Mr. Halpin because they went, as we have described it in the opinion herein, "court hopping" with neither the necessity nor the power to do so, and Mr. Rust, individually, because of his false statements to the superior court and to this Court. Judges Schaber and Perluss have disagreed with our appraisal of Mr. Rust's actions and motives. We can only speculate as to what the opinions of the judges mentioned might be had the opportunity been afforded them to weigh the materials submitted to us in these matters.

Our attention has been called to a statement made in the filed opinion describing the conversation between Judge Perluss and Judge Abbe on July 1, 1969. On the face of the record this court was justified in believing as we stated in our filed opinion (typewritten opinion p. 5) "that the Shasta action proceeded through the damage phase and to judgment (more or less at the telephoned suggestion of the Sacramento County Superior Court judge). . . ." That statement is elaborated upon in the opinion (on page 14) by a quotation from the Sacramento Superior Court judge's statement as contained in the Sacramento County transcript of July 1, 1969. We need not reiterate its contents. We have ascertained that Judge Abbe when he telephoned Judge Perluss had already decided to proceed with the trial; that he did not then believe that another superior court had the right to issue the injunction which had been issued; that he does not believe so now. We share that belief.

WHEN WILL IT ALL END?

Mr. Giles was injured on January 17, 1967. A complaint was filed. Issues were joined between all parties involved and a trial commenced in a proper court (Shasta County Superior Court) on January 25, 1968. Bifurcation of the trial separating the issue of liability and the issue of damages was properly made in the interest of expediting the litigation. The issue of liability was determined on March 26, 1969, nearly two years ago. On May 14, 1969, Mr. Rust filed the Sacramento action out of which these proceedings arise.

Our order to show cause in these matters was issued april 10, 1970, ten months ago. Had the Shasta court heeded the "preliminary injunction" issued by the Sacramento court, the Shasta action would not yet have been completely tried. An appeal from the Shasta action is pending. It cannot be resolved until these proceedings have become final. And they are not *yet* ended. Undoubtedly, relief will be sought from a higher court.

IT IS ORDERED that petitioner David Rust's "Application for Leave to Petition for a Rehearing" in this court be and the same is hereby denied. (CERTIFIED FOR NONPUBLICATION.)

CERTIFICATION OF NONPUBLICATION

This opinion does not require publication in the advance sheets or official reports under the standards provided by rule 976, California Rules of Court.

Pierce, *P. J.*
Regan, *J.*
Bray, *J. Assigned*

APPENDIX C.

Office of the Clerk, Court of Appeal, Third Appellate District, State of California.

October 8, 1970.

Messrs. Fitzwilliam, Memering
Stumbos & DeMers
Attorneys at Law
708 - 10th Street
Sacramento, California

Messrs. Rust, Hoffman & Mills
Attorneys at Law
520 Capitol Mall
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Messrs. Bledsoe, Smith, Cathcart
Johnson & Rogers
Attorneys at Law
650 California Street
San Francisco, California

Mr. Jack Halpin
Attorney at Law
1648 Riverside Drive
Redding, California

Re: Halpin vs. Superior Court (Sacramento); Douglas Guardian Warehouse—3 Civil 12594. Hyster Company vs. Superior Court (Sacramento) 3 Civil 12606.

Gentlemen:

The court has instructed me to write you regarding the following matters not argued which it believes the parties should have an opportunity to discuss. Argument, it feels, will not only aid the court in its decision but may prevent an injustice harmful to the reputation of a party involved in the event inferences, now seemingly proper to be drawn from certain parts of the record and which may be covered in the opinion herein, should not actually be drawn.

1. The complaint in the Sacramento County action alleges a separate severable contract between plaintiff Giles, through his attorney, on the one hand and Douglas Guardian Warehouse ("Warehouse") on the other under the terms of which Warehouse was to pay $25,000 immediately (i.e. on or about March 14, 1969) and plaintiff was immediately to dismiss the Shasta County action as against Warehouse. Although negotiations between the plaintiff and other parties are mentioned, no allegation suggests that any agreement with them was reached and therefore no contract with such parties was an issue in the case. (Moreover at oral argument on the hearing before this court it was conceded in response to a question by the presiding justice that Warehouse under the agreement reached between Giles and Warehouse actually had agreed to pay $50,000 of which $25,000 was its own money and $25,000 was to be paid by its insurance carrier.) The proposed findings in the Sacramento action, however, prepared on the stationery of Mr. Rust describe a quite different settlement. They find a contract by plaintiff with not only Warehouse but state that Hyster Corporation and Gold Rey Plywoods Sales, Inc. were participating payors under the same contract. That contract is described on page 2 of the proposed findings between lines 12 and 28 thereof. The proposed findings were objected to both by defendants and by Hyster Corporation who had sought to intervene specially and had been denied permission to do so.

The findings (clearly as it now seems to the court) were outside the issues presented by the complaint and affected parties not before the court. They were nevertheless signed as proposed by the trial court. The court would like explanation as to how and why such findings were so prepared and under what representations the court was induced to sign findings outside the record.

2. In the petition herein filed by Hyster (in paragraph VI) there is alleged (categorically) to be in existence a certain letter written "by attorneys for [Warehouse] to the said Jack Halpin." It is thereafter alleged on information in the same paragraph that the letter was written and mailed before the filing of the Sacramento action and evidenced an agreement (or proposal of an agreement) that if a decision in the Sacramento action was against Giles and Halpin it would not be binding upon them. The opposition filed by Mr. Rust to said petition states: "In further answer to said paragraph VI of the petition [Warehouse] alleges that it has no information or belief upon the subject sufficient to enable it to answer said paragraph and basing its denial upon that ground, denies the allegations therein contained." This, under the law, is an admission of the allegation. The author of a letter cannot deny for want of information either that he wrote a letter or its contents. Moreover the letter was not a privileged communication between attorney and client. Here the sender and receiver were adversaries. The court orders that the letter, either in its original form or Mr. Rust's copy certified be filed with the court. It will permit argument why that letter is not either a proposal for fictitious litigation or evidence of an agreement between Warehouse, Rust, Giles and Halpin for

fictitious litigation. It wants argument on why sanctions for commission of a fraud upon the Superior Court and upon this court should not be imposed. The letter, as the court now views the matter, constitutes collusion in the institution of the Sacramento County action.

Douglas Guardian Warehouse and Messrs. Rust and Halpin are granted 10 days within which to file written explanations, points and authorities in letter form with this court; Hyster, through its attorneys shall have 10 days within which to reply. The letter referred to from Rust to Halpin or a certified copy thereof shall be filed with the court forthwith.

Very truly yours,

/s/ Wilfried J. Kramer
WILFRIED J. KRAMER, Clerk

cc-Hon. Irving Perluss
Hon. Richard Abee

APPENDIX D.

Application for Leave to Petition for a Rehearing in the Court of Appeal as an Added Respondent.

In the Court of Appeal, Third Appellate District, State of California.

Jack Halpin and Max G. Giles, Petitioners, vs. the Superior Court of the State of California, in and for the County of Sacramento, Respondent. 3 Civil No. 12594.

Hyster Company, Petitioner, vs. the Superior Court of the State of California, in and for the County of Sacramento, Respondent. 3 Civil No. 12606.

Petitioner David C. Rust finds it necessary to file this Application and Petition by reason of the following events:

1. The firm of Rust and Mills, of which Petitioner is a member, is the attorney of record in the foregoing proceedings for Douglas Guardian Warehouse ("Warehouse"). Petitioner has been personally involved in this litigation.

2. In its opinion, the Court has severely criticized Petitioner's handling of this litigation and has both by direct accusation and by unmistakable inference accused Petitioner of serious acts of unprofessional conduct and sharp practices. In fact, the greater part of the Court's opinion is devoted to criticism of Petitioner's conduct.

3. The Court's opinion, as presently written, threatens serious injury to Petitioner's reputation and career.

Under the foregoing circumstances, Petitioner is a party aggrieved by this Court's opinion and is entitled to appear and challenge that opinion. As stated by the United States Supreme Court in the recent case of *Wis-*

consin v. Constantineau, decided January 19, 1971 (39 Law Week. 4128; C.C.H. Supreme Court Bulletin B 643):[1]

> "Where a person's good name, reputation, honor, or integrity are at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."

In view of the fact that this Court's opinion is so clearly injurious to Petitioner's good name, reputation, honor and integrity, it is submitted that Petitioner's standing to appear and challenge this Court's opinion should be recognized and that this Petition should be granted.

See also:

Armstrong v. Manzo, 380 U.S. 545, 550-552;
Mullane v. Cent. Hanover Bk. & Tr. Co., 339 U.S. 306;
Badorek v. General Motors, California Supreme Court Minute Order dated January 14, 1971;
Endler v. Schultzbank, (1968) 68 Cal. 2d 162, 172;
Spector v. Superior Court, (1961) 55 Cal. 2d 839;
McClatchy v. Superior Court, (1897) 119 Cal. 413.

4. It is further submitted that Petitioner has good and substantial grounds for challenging this Court's opinion. These grounds are discussed in further detail in the attached Petition for Rehearing which is incorporated herein by reference in support of this Application. Said grounds are briefly summarized as follows:

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[1] For the convenience of the Court, a copy of said decision is attached hereto as Appendix A. The majority opinion only is attached. The dissenting opinions expressed the view that the case should have first been determined in the State Courts.

a. As heretofore noted, the United States Supreme Court has held that where a person's good name, reputation, honor or integrity are at stake because of government action, notice and an opportunity to be heard are essential.

Wisconsin v. Constantineau, supra.

Petitioner's constitutionally protected interests are adversely affected by this Court's decision, but Petitioner has not been afforded a noticed hearing.

b. One of the constitutional requirements of a noticed hearing is that all of the charges must be known before the proceeding commences. A violation of due process results where a party is charged with one offense and then found guilty of another, regardless of whether the proceeding is criminal or civil.

In re Ruffalo, 390 U.S. 544, 551;

Murray v. Murphy, (1969) 24 N.Y. 2d 150, 247 N.E. 2d 143, 147.

See also:

Shively v. Stewart, (1966) 65 Cal. 2d 475, 480;

Cole v. Arkansas, 333 U.S. 196, 201.

This Court's letter to all counsel of October 8, 1970 does not satisfy the requirements of due process as to notice. In said letter, this Court requested explanation of two matters only: (i) the circumstances under which the Trial Court signed the findings and (ii) the circumstance concerning the purported agreement between Mr. Halpin and Petitioner concerning the binding effect of instant lawsuit. Even if the Court's letter satisfied the notice requirements of due process, which Petitioner contends it does not, it would relate only to the two matters concerning which information was requested and did not put Petitioner on notice of the numerous charges of misconduct appearing in this Court's opinion.

c. The summary and informal proceeding by which the Court elicited information from counsel does not satisfy the hearing requirements of due process in another respect. The Court's charges of misconduct against Petitioner are based upon factual determinations by this Court concerning matters which occurred outside the presence of the Court. Where factual determinations are to be made, due process requires a hearing and the right to cross-examination.

> *Greene v. McElroy,* 360 U.S. 474, 496;
>
> *Slaughter v. Edwards,* (1970) 11 Cal. App. 3d 285, 293-294.
>
> *Cf.: Arthur v. Superior Court,* (1965) 62 Cal. 2d 404, 407-408.

d. Finally, it is submitted that the accusations and inferences of misconduct by Petitioner appearing in this Court's decision are unsupported by the limited evidence before this Court and in fact are inaccurate.

For all of the foregoing reasons, it is respectfully requested that Petitioner be permitted to file the attached Petition for Rehearing, that a rehearing be granted, and that this Court modify its opinion by deleting therefrom the portions which accuse Petitioner of or infer that Petitioner has been guilty of unprofessional or unethical conduct.

Respectfully submitted,

HORVITZ & MINIKES,
By Ellis J. Horvitz,
Attorneys for Petitioner
David C. Rust.

Petition for Rehearing.

Introduction.

In its opinion, this Court has severely criticized Petitioner's conduct in handling this case. Both by direct accusation and by inference, Petitioner is accused of numerous acts of professional misconduct, and numerous statements are made impugning Petitioner's integrity and motives in several aspects of this litigation. Indeed, the greater portion of the opinion is devoted to a severe and extended criticism of Petitioner's conduct in nearly every aspect of this litigation.

Petitioner contends that the Court's opinion seriously impairs Petitioner's constitutionally protected right to his good name, reputation, honor and integrity and to his professional career without due process of law. In addition, the purported conduct criticized in the Court's opinion is necessarily predicated upon factual determinations by this Court of events which did not occur in the Court's presence and may not be judicially noticed. As hereinafter discussed, it is Petitioner's contention that said determinations may not be sustained either procedurally or factually and should therefore be deleted from this Court's opinion.

LEGAL DISCUSSION.

A. This Court May Not Impair Petitioner's Good Name, Reputation, Honor or Integrity or Impair His Professional Career Without Affording Him Notice of the Charges Against Him and an Opportunity to Be Heard.

1. It is Petitioner's contention that the potential injury resulting from the publication of this Court's opinion results in an unconstitutional impairment of

Petitioner's good name, reputation, honor and integrity without due process of law. Thus, in the recent case of *Wisconsin v. Constantineau,* decided January 19, 1971 (a copy of said opinion is attached hereto), the United States Supreme Court declared unconstitutional a Wisconsin statute which permitted a public official to post a notice that Mrs. Constantineau was an excessive drinker without first affording her notice and a hearing to challenge the characterization. The Supreme Court stated:

> 'We have no doubt as to the power of a State to deal with the evils described in the Act. The police power of the States over intoxicating liquors was extremely broad even prior to the Twenty-First Amendment. (Citation.) The only issue present here is whether the label or characterization given a person by 'posting,' though a mark of serious illness to some is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard. We agree with the District Court that the private interest is such that those requirements of procedural due process must be met.
>
> "It is significant that most of the provisions of the Bill of Rights are procedural, for it is procedure that marks much of the difference between rule by law and rule by fiat.
>
> ". . . certainly where the State attaches 'a badge of infamy' to the citizen, due process comes into play. (Citation.) '. . . the right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.' (Citation.)

> "Where a person's good name, reputation, honor or integrity are at stake because of what the government is doing to him; notice and an opportunity to be heard are essential. . . . Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented."

In the present case, there can be no question but that the publication of this Court's decision seriously impairs Petitioner's good name, reputation, honor and integrity. The Court's decision has not been certified for non-publication, and will be circulated among attorneys throughout this State and elsewhere. The potential injury to Petitioner's reputation and career from the publication and distribution of this opinion will be incalculable. Mr. Witkin has described criticism of an attorney in a judicial opinion as "a severe sanction". (Witkin, California Procedure, 2d Ed., Vol. I, p. 195.) In many of the cases cited therein, the criticism of counsel is mild compared to the criticism of Petitioner in the present case.

On the basis of the above cited authority, it follows that the publication of the Court's decision violates procedural due process unless the charges and inferences of misconduct are based upon a noticed hearing which fulfills the requirements of due process of law. As discussed below, neither notice nor hearing has been afforded in the present case.

2. In addition, the publication of this Court's decision is likely to impair Petitioner's reputation and

good name in the legal community and may adversely affect his ability to engage in the practice of law. As stated in *Endler v. Schutzbank,* (1968) 68 Cal. 2d 162, at 172:

> "Procedural due process requires notice, confrontation, and a full hearing whenever action by the state significantly impairs an individual's freedom to pursue a private occupation."

And at 173:

> "We thus affirm an elementary requirement of justice when we hold, as we do here, that the state may not make a man an outcast in his own profession without affording him *a full opportunity* to present his defense." (Emphasis added)

B. This Court Has Failed to Afford Petitioner Notice and a Hearing in Accordance With Due Process of Law.

This Court's statements accusing Petitioner of numerous acts of misconduct all involve factual determinations by the Court concerning events to which the Court was not a percipient witness.

Under such circumstances, procedural due process requires notice, confrontation, and a full hearing. We enumerate below the particulars in which the present proceedings are deficient:

1. Petitioner Was Not Given Notice of the Charges of Misconduct Appearing in the Court's Opinion.

In the case of *In re Ruffalo,* 390 U.S. 544, the United States Supreme Court held that an attorney could not be disbarred from Federal Court on the basis of a charge not included in the original accusation against him. It appears that twelve charges of misconduct were brought against Mr. Ruffalo in a State Board proceeding and that during the hearing, on the basis of defense evidence introduced by Ruffalo, a thirteenth charge of misconduct was added concerning his employment of a Mr. Orlando. He was subsequently disbarred from the Federal District Court on the basis of Charge No. 13. In reversing the Order of the District Court, the Supreme Court stated at pages 550-551:

> "In the present case Petitioner (Ruffalo) had no notice that his employment of Orlando would be considered a disbarment offense until *after* both he and Orlando had testified at length on all the material facts pertaining to this phase of the case. As Judge Edwards, dissenting below, said, 'Such procedural violation of due process would never pass muster in any normal civil or criminal litigation.' 370 F. 2d at 462.
>
> "These are adversary proceedings of a quasi-criminal nature (citation). The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. . . ."

The Court continued at page 552:

> "This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprive Petitioner of procedural due process."

See also:

Murray v. Murphy, (1969—N.Y. Court of Appeals) 24 N.Y. 2d 150, 247 N.E. 2d 143, 147;

Cf. Shively v. Stewart, (1966) 65 Cal. 2d 475, 480;

Cole v. Arkansas, 333 U.S. 196, 201.

While the foregoing authorities are concerned primarily with administrative proceeding,[2] it is clear that the same principles apply to judicial conduct. Thus, in connection with the Court's authority to adjudge a person in contempt under C.C.P. §1211, the rule was stated as follows in *Arthur v. Superior Court,* (1965) 62 Cal. 2d 404, at 407-408:

> "Contempt committed in the immediate view and presence of the court, known as direct contempt, may be treated summarily. All that is required is that an order be made reciting the facts, adjudging the person guilty, and prescribing the punishment. If, however, the contempt did not occur in the immediate view and presence of the court, it becomes indirect contempt and a more elaborate procedure must be followed in order to notify the person so charged and to allow him an opportunity to be heard. In such cases an affidavit must be presented to the court stating the facts constituting the contempt, an order to show cause must be issued, and a hearing on the facts must be held by the judge. (Citation.)"

The foregoing requirements of due process have not been met in the present case. Notice of charges was not furnished to Petitioner. This Court did address a letter to all counsel dated October 8, 1970.[3] In said letter, this Court requested explanation of two matters only:

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[2] Or with a criminal proceeding, as in *Cole v. Arkansas.*

[3] Referred to at page 6 of this Court's decision as a request for "explanation."

> a. ". . . explanation as to how and why such findings (those signed by the Trial Court) were so prepared and under what representations the court was induced to sign findings outside the record.", and
>
> b. The circumstances concerning the agreement between Mr. Halpin and Petitioner concerning the binding effect of the instant lawsuit. As to this second charge only, the Court requested argument "on why sanctions for commission of a fraud upon the Superior Court and upon this Court should not be imposed."

Even if the October 8th letter satisfied the notice requirements of due process, which Petitioner contends it does not, it would relate only to the two matters concerning which information was requested, and it put Petitioner on notice of an accusation against him only as to the second charge. It did not put Petitioner on notice of any of the numerous findings of misconduct appearing in this Court's opinion.

2. Petitioner Has Not Been Afforded a Hearing.

Another requirement of procedural due process is the right to confrontation and cross-examination. This requirement was explained as follows in *Greene v. McElroy,* 360 U.S. 474, commencing at page 496:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the government's case must be disclosed to

> the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases (citations) but also in all types of cases where administrative and regulatory actions were under scrutiny (citations). . . ."

In the present case, the only hearing or trial which meets the requirements of due process is the civil trial which occurred in Sacramento Superior Court before Judge Perluss. However, that case did not involve any charges of misconduct against Petitioner. Moreover, as discussed more fully below, the Trial Court made findings of fact concerning the existence of a settlement agreement between Warehouse and Giles which are directly at odds with the factual determinations made by this Court and upon which this Court has based its most serious accusations of misconduct. Stated another way, the findings prepared by the Trial Court are wholly incompatible with the most serious charges this Court has made against Petitioner.[4] Under these circumstances, the need for a hearing which includes the right to confrontation and cross-examination of witnesses is particularly compelling.

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[4] There is no reporter's transcript of that proceeding.

C. The Evidence Before the Court Does Not Support the Statements in the Court's Opinion Accusing Petitioner of Misconduct.

Mr. Witkin has observed that our appellate courts are not equipped to try issues of fact and that in the rare case where a Petition for Prohibition or Mandamus involves disputed issues of fact outside the record, the appellate court may order a reference (3 Witkin, California Procedure, pp. 2558-2560, particularly p. 2560).

In the present case, this Court did not order a reference; it did not afford Petitioner a hearing; it received sworn statements from several attorneys (and an unverified letter from one) which were not prepared with reference to or knowlecge of the charges ultimately made against Petitioner; it proceeded to select statements from the various declarations and petitions. . . .

APPENDIX E.

B. The Court ~~of Appeal~~ May Not Impair Petitioner's Good Name, Reputation, Honor or Integrity or Impair His Professional Career Without Affording Him Notice of the Charges Against Him and an Opportunity to Be Heard.

1. It is Petitioner's contention that the potential injury resulting from the publication of the Court of Appeal's opinion will result in an unconstitutional impairment of Petitioner's good name, reputation, honor and integrity without due process of law. Thus, in the recent case of *Wisconsin v. Constantineau,* decided January 19, 1971 (a copy of said opinion is attached hereto), the United States Supreme Court declared unconstitutional a Wisconsin statute which permitted a public official to post a notice that Mrs. Constantineau was an excessive drinker without first affording her notice and a hearing to challenge the characterization. The Supreme Court stated:

> "We have no doubt as to the power of a State to deal with the evils described in the Act. The police power of the States over intoxicating liquors was extremely broad even prior to the Twenty-First Amendment. (Citation.) The only issue present here is whether the label or characterization given a person by 'posting,' though a mark of serious illness to some is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard. We agree with the District Court that the private in-

> terest is such that those requirements of procedural process must be met.
>
> "It is significant that most of the provisions of the Bill of Rights are procedural, for it is procedure that marks much of the difference between rule by law and rule by fiat.
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> ". . . certainly where the State attaches 'a badge of infamy' to the citizen, due process comes into play. (Citation.) '. . . the right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.' (Citation.)
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> "Where a person's good name, reputation, honor or integrity are at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. . . . Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented."

In the present case, there can be no question but that the publication of the Court of Appeal opinion will seriously impair Petitioner's good name, reputation, honor and integrity. The opinion has not been certified for non-publication, and will be circulated among attorneys, judges and others throughout this State and elsewhere. The potential injury to Petitioner's reputation and career from the publication and distribution of this opinion will be incalculable. Mr. Witkin has described criticism of an attorney in a judicial opinion as "a severe sanction". (Witkin, California Procedure, 2d Ed., Vol. I, p. 195) In many of the cases cited therein, the criticism of counsel is mild compared to the criticism of Petitioner in the present case.

On the basis of the above cited authority. it follows that the publication of the Court's decision violates procedural due process unless the charges and inferences of misconduct are based upon a noticed hearing which fulfills the requirements of due process of law. As discussed below, neither notice nor hearing has been afforded in the present case.

2. In addition, the publication of the Court of Appeal opinion decision is likely to impair Petitioner's reputation and good name in the legal community and may adversely affect his ability to engage in the practice of law. As stated in *Endler v. Schutzbank,* (1968) 68 Cal. 2d 162, at 172:

> "Procedural due process requires notice, confrontation, and a full hearing whenever action by the state significantly impairs an individual's freedom to pursue a private occupation."

And at 173:

> "We thus affirm an elementary requirement of justice when we hold, as we do here, that the state may not make a man an outcast in his own profession without affording him *a full opportunity* to present his defense." (Emphasis added)

C. The Court of Appeal Has Failed to Afford Petitioner Notice and a Hearing in Accordance With Due Process of Law.

The Court of Appeal's statements accusing Petitioner of numerous acts of misconduct all involve factual determinations by that Court concerning events to which that Court was not a percipient witness. Indeed, the Finding of Fact of the Trial Court and the Declarations by the trial judges who participated in the case and observed Petitioner and the other trial counsel are directly contrary to the statements of the Court of Appeal.

Under such circumstances, procedural due process requires notice, confrontation, and a full hearing. We enumerate below the particulars in which the proceedings before the Court of Appeal were deficient and unfair:

1. Petitioner Was Not Given Notice of the Charges of Misconduct Appearing in Court's Opinion.

In the case of *In re Ruffalo,* 390 U.S. 544, the United States Supreme Court held that an attorney could not be disbarred from Federal Court on the basis of a charge not included in the original accusation against him. It appears that twelve charges of misconduct were brought against Mr. Ruffalo in a State Board proceeding and that during the hearing, on the basis of defense evidence introduced by Ruffalo, a thirteenth charge of misconduct was added concerning his employment of a Mr. Orlando. He was subsequently disbarred from the Federal District Court on the basis of Charge No. 13. In reversing the Order of the District Court, the Supreme Court stated at pages 550-551:

> "In the present case Petitioner (Ruffalo) had no notice that his employment of Orlando would be considered a disbarment offense until *after* both he and Orlando had testified at length on all the material facts pertaining to this phase of the case. As Judge Edwards, dissenting below, said, 'Such

> procedural violation of due process would never pass muster in any normal civil or criminal litigation.' 370 F. 2d at 462.
>
> "These are adversary proceedings of a quasi-criminal nature (citation). The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. . . ."

The Court continued at page 552:

> "This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprive Petitioner of procedural due process."

See also:

> *Murray v. Murphy,* (1969—N.Y. Court of Appeals) 24 N.Y. 2d 150, 247 N.E. 2d 143, 147;
>
> *Cf. Shively v. Stewart,* (1966) 65 Cal. 2d 475, 480;
>
> *Cole v. Arkansas,* 333 U.S. 196, 201.

While the foregoing authorities are concerned primarily with administrative proceedings,[1] it is clear that the same principles apply to judicial conduct. Thus, in connection with the Court's authority to adjudge a person in contempt under C.C.P. §1211, the rule was stated as follows in *Arthur v. Superior Court,* (1965) 62 Cal. 2d 404, at 407-408:

> "Contempt committed in the immediate view and presence of the court, known as direct contempt, may be treated summarily. All that is required is that an order be made reciting the facts,

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[1] Or with a criminal proceeding, as in *Cole v. Arkansas.*

> adjudging the person guilty, and prescribing the punishment. If, however, the contempt did not occur in the immediate view and presence of the court, it becomes indirect contempt and a more elaborate procedure must be followed in order to notify the person so charged and to allow him an opportunity to be heard. In such cases an affidavit must be presented to the court stating the facts constituting the contempt, an order to show cause must be issued, and a hearing on the facts must be held by the judge. (Citation.)"

The foregoing requirements of due process have not been met in the present case. Notice of charges was not furnished to Petitioner. The Court of Appeal did address a letter to all counsel dated October 8, 1970.[2] In said letter, the Court requested explanation of two matters only:

> a. ". . . explanation as to how and why such findings (those signed by the Trial Court) were so prepared and under what representations the court was induced to sign findings outside the record.", and
>
> b. The circumstances concerning the agreement between Mr. Halpin and Petitioner concerning the binding effect of the instant lawsuit. As to this second charge only, the Court requested argument "on why sanctions for commission of a fraud upon the Superior Court and upon this Court should not be imposed."

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[2] Referred to at page 6 of the Court's decision as a request for "explanation." But this Court should note that the letter already treats as fact certain matters even before reply was made.

Even if the October 8th letter satisfied the notice requirements of due process, which Petitioner contends it does not, it would relate only to the two matters concerning which information was requested, and it put Petitioner on notice of an accusation against him only as to the second charge. It did not put Petitioner on notice of any of the numerous findings of misconduct appearing in the Court's opinion.[3]

2. Petitioner Has Not Been Afforded a Hearing.

Another basic requirement of procedural due process is the right to confrontation and cross-examination. This requirement was explained as follows in *Greene v. McElroy,* 360 U.S. 474, commencing at page 496:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient

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[3] We say "Findings" because such statements in an appellate court opinion are taken as fact by the bar and by the public.

> roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases (citations) but also in all types of cases where administrative and regulatory actions were under scrutiny (citations). . . ."

In the present case, the only hearing or trial which meets the requirements of due process is the civil trial which occurred in Sacramento Superior Court before Judge Perluss. However, that case did not involve any charges of misconduct against Petitioner. Moreover, as discussed more fully below, the Trial Court made findings of fact based on sworn testimony and cross-examination in adversary proceedings, concerning the existence of a settlement agreement between Warehouse and Giles which supports Petitioner's position here and are directly at odds with the factual determinations made by the Court of Appeal and upon which the Court of Appeal based its most serious accusations of misconduct. Stated another way, the findings prepared by the Trial Court are wholly incompatible with the most serious charges the Court of Appeal has made against Petitioner.[4] Under these circumstances, the need for a hearing which includes the right to confrontation and cross-examination of witnesses is particularly compelling.

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[4] There is no reporter's transcript of that proceeding.

D. The Evidence Before the Court of Appeal Does Not Support the Statements in the Court's Opinion Accusing Petitioner of Misconduct.

Mr. Witkin has observed that our appellate courts are not equipped to try issues of fact and that in the rare case where a Petition for Prohibition or Mandamus involves disputed issues of fact outside the record, the appellate court may order a reference (3 Witkin, California Procedure, pp. 2558-2560, particularly p. 2560).

In the present case, the Court of Appeal did not order a reference; it did not afford Petitioner a hearing; it received sworn statements from several attorneys (and an unverified letter from one) which were not prepared with reference to or knowledge of the charges ultimately made against Petitioner; it proceeded to select. . . .

APPENDIX F.

Application for Leave to Petition for a Hearing in The Supreme Court.

In the Supreme Court of the State of California.

Jack Halpin and Max G. Giles, *Petitioners,* vs. The Superior Court of the State of California, in and for the County of Sacramento, *Respondent.* 3 Civil No. 12594.

Hyster Company, *Petitioner,* vs. The Superior Court of the State of California, in and for the County of Sacramento, *Respondent.* 3 Civil No. 12606.

Petitioner, David C. Rust, files this application and petition by reason of the following events:

1. Petitioner has been engaged in the practice of law in California for nearly 20 years. Prior to issuance of the Court of Appeal opinion in this case, he has never been subjected to any disciplinary proceeding or criticized or censured by any Court for misrepresentation, dissembling or engaging in dishonest practices.

2. The firm of Rust and Mills, of which Petitioner is a member, are attorneys of record in the foregoing proceedings for Douglas Guardian Warehouse ("Warehouse"). Petitioner has been directly involved in this litigation.

3. In its published opinion,[1] the Court of Appeal severely criticized Petitioner's handling of this litigation and has accused Petitioner and found him guilty of serious acts of professional misconduct and sharp

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[1] The Court of Appeal issued a published opinion dated January 20, 1971. This opinion will be referred to as the "published opinion". A copy of said opinion is attached as Appendix A.

practices. The Court of Appeal opinion has caused and will continue to cause serious injury to Petitioner's reputation and career.

4. None of said purported acts of misconduct occurred in the presence of the Court of Appeal; none appear on the record before the Court of Appeal; and Petitioner was not afforded a hearing so that he could answer and disprove the charges made against him.

5. Following issuance of the Court of Appeal's published opinion, Petitioner filed an Application for Leave to Petition for Rehearing, and a Petition for Rehearing in the Court of Appeal. By opinion dated February 17, 1971, and certified for non-publication (Appendix B to Petition for Hearing) the Court of Appeal denied Petitioner's Application for Leave to Petition for a Rehearing. In said unpublished opinion, the Court of Appeal further criticized Petitioner and further elaborated on the charges and accusation previously set forth in its published opinion.

6. On February 11, 1971, Petitioner filed an original Writ of Mandate, Prohibition and/or other appropriate relief, in this Court, and said matter is presently pending.

7. The Court of Appeal opinion is causing and will continue to cause serious injury to Petitioner's good name, reputation, honor, integrity, and professional career. Under the circumstances, Petitioner is a party aggrieved by the Court of Appeal opinion and should be entitled to a hearing in order to challenge it. As stated by the United States Supreme Court in the recent case of *Wisconsin v. Constantineau*, decided January 19,

1971 (39 Law Week. 4128; C.C.H. Supreme Court Bulletin B 643):

> "Where a person's good name, reputation, honor, or integrity are at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."

See:

Petition of Samuel H. Sterling, (Colo., 1956) 301 P. 2d 346;

Endler v. Schultzbank, (1968) 68 Cal. 2d 162, 172;

See also:

Armstrong v. Manzo, 380 U.S. 545, 550-552;

Mullane v. Cent. Hanover Bk. & Tr. Co., 339 U.S. 306;

Badorek v. General Motors, California Supreme Court Minute Order dated January 14, 1971;

Spector v. Superior Court, (1961) 55 Cal. 2d 839;

McClatchy v. Superior Court, (1897) 119 Cal. 413.

8. A detailed statement of the grounds upon which Petitioner seeks a hearing are set forth in the attached Petition for Hearing, which is incorporated herein by reference in support of this application. Said grounds are briefly summarized as follows:

a. As noted above, the United States Supreme Court has held that where a person's good name, reputation, honor or integrity are at stake, because of government action, notice and an opportunity to be heard are essential.

Wisconsin v. Constantineau, supra,

See also:

Petition of Samuel H. Sterling, Esq., supra, 301 P. 2d 346.

b. One of the Constitutional requirements of a noticed hearing is that all of the charges must be known before the proceeding commences. A violation of due process results where a party is charged with one offense and is then found guilty of another regardless of whether the proceedings is civil or criminal.

In re Ruffalo, 390 U.S. 544, 551;

Murray v. Murphy, (1969) 24 N.Y. 2d 150, 247 N.E. 2d 143, 147.

See also:

Shively v. Stewart, (1966) 65 Cal. 2d 475, 480;

Cole v. Arkansas, 333 U.S. 196, 201.

c. Petitioner does not challenge the right of the Court to censure an attorney for conduct which occurs in the presence of the Court or which appears on the face of the record before the Court.[2] However, in the present case, the Court of Appeal's charges of misconduct against Petitioner are based upon factual determinations by the Court of Appeal concerning matters which occurred outside the presence of the Court and do not appear on the face of the record before the Court. Where factual determinations are to be made, due process requires fair notice, a hearing and a right to cross-examination.

Greene v. McElroy, 360 U.S. 474, 496;

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[2] Such an improper argument in the trial court, which appears verbatim in the reporter's transcript on appeal.

Arthur v. Superior Court, (1965) 62 Cal. 2d 404, 407-408;

Slaughter v. Edwards, (1970) 11 Cal. App. 3d 285, 293-294.

d. Finally, Petitioner contends that the Court of Appeal's accusations and findings of misconduct against him are unsupported by the limited evidence before the Court of Appeal and that, given a fair hearing before an impartial tribunal in accordance with the requirements of due process, Petitioner can produce overwhelming and unimpeachable evidence establishing that the Court of Appeal's charges against him are in fact inaccurate and unwarranted.

For all of the foregoing reasons, it is respectfully requested that Petitioner be permitted to file the attached Petition for Hearing; that a hearing be granted, that Petitioner be afforded an opportunity to present evidence to this Court or to a referee appointed by this Court to disprove the accusations of misconduct against him appearing in the Court of Appeal's opinion, and that, on satisfactory proof thereof, this Court publicly exonerate Petitioner so that he can proceed to rebuild his reputation and career.

Respectfully submitted,

HORVITZ & MINIKES and SELVIN & COHN,
By ELLIS J. HORVITZ, and
PAUL R. SELVIN,
Attorneys for Petitioner,
David C. Rust.

Petition for Hearing.

Introduction.

Petitioner is one of the attorneys of record in consolidated cases 3rd civil numbers, 12594 and 12606. On January 20, 1971, the Court of Appeal issued an opinion in said cases (a copy of said opinion is attached hereto as Appendix A), in which it accused and found Petitioner guilty of numerous and serious acts of professional misconduct and has otherwise seriously impuned Petitioner's integrity, motives and activities in this case.

The purported acts of misconduct of which the Court of Appeal has accused Petitioner and found him guilty did not occur in the presence of the Court of Appeal and do not appear in the record before the Court of Appeal.[1] Petitioner was afforded neither notice of the charges which the Court of Appeal subsequently made against him nor a hearing at which he could refute the Court of Appeal's accusations and findings. Therefore, the serious public accusations and findings against Petitioner appearing in the Court of Appeal opinion are violative of Petitioner's rights to due process of law.

Petitioner applied for leave to petition the Court of Appeal for rehearing, which application was denied by opinion dated February 17, 1971, and certified for non-publication (a copy of said opinion is attached hereto as Appendix B.) Petitioner likewise filed an original writ proceeding in this Court, which is presently pending. Meanwhile, the Court of Appeal's published opinion of January 20, 1971, has been published in the advance sheets and will be or is presently being circulated among the members of the bench and the bar of this State, and to subscribing attorneys, libraries, and other institutions in this State and elsewhere. The resulting injury to Petitioner's professional reputation and career is incalculable and will be substantially irreparable. Petitioner is therefore a party aggrieved by the Court of Appeal opinion.

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[1] It should be emphasized at the outset that Petitioner does not challenge the right of an appellate court to censure an attorney for misconduct which occurs in the presence of the court or on the fact of the record before the court, *i.e.* improper argument in the trial court which is reported verbatim in the reporter's transcript on appeal.

Petitioner requests this Court to grant a hearing, to thereafter afford Petitioner an opportunity to disprove the accusations and charges made against him in the Court of Appeal opinion and, upon satisfactory proof, to afford Petitioner public exoneration so as to mitigate the injury already done to Petitioner's reputation and career.

Grounds for Hearing.

It is respectfully submitted that a hearing in the Supreme Court should be granted in order to settle important constitutional questions and to resolve conflicts between the Court of Appeal decision and recent decisions by this Court and by the United States Supreme Court.

More specifically, Petitioner contends a hearing should be granted for the following reasons:

1. In the recent case of *Wisconsin v. Constantineau,* decided January 19, 1971 (39 Law Week. 4128; CCH Supreme Court Bulletin B 643), the United States Supreme Court held that:

> "Where a person's good name, reputation, honor or integrity are at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. . . ."

In *Endler v. Schutbank,* (1968) 68 Cal. 2d 162 at 172-173, this Court stated that procedural due process requires notice, confrontation and a full hearing whenever action by the state "significantly impairs an individual's freedom to pursue a private occupation" and that "the state may not make a man an outcast in his own profession without affording him a full opportunity to present his defense."

In the present case, the Court of Appeal opinion clearly disparages Petitioner's good name, reputation, honor and integrity and will significantly impair his professional career. Nevertheless, Petitioner has not been afforded notice, nor a hearing, nor an opportunity to answer and defend against the charges of misconduct made in the Court of Appeal opinion.

The purported misconduct by Petitioner did not occur in the presence of the Court of Appeal and does not appear on the face of the record before the Court of Appeal. Under such circumstances, the inherent and summary authority of a court to control its own proceedings and to discipline or censure the attorneys who appear before it is not applicable. Where the conduct in question appears outside the presence of the court and does not appear on the fact of the record, the requirements of procedural due process come into play.

See: *Arthur v. Superior Court,* (1965) 62 Cal. 2d 404, 407-408.

2. The following requirements of due process have not been met in the present case:

a. The charge or accusation must be known before the proceedings commence:

In re Ruffalo, 390 U.S. 544;

Murray v. Murphy, (N.Y. 1969) 24 N.Y. 2d 152, 247 N.E. 2d 143, 147.

That was not done here. In the Court of Appeal opinion, Petitioner is charged with acts of misconduct of which he had no prior notice.

b. Due process requires the right to confrontation and cross-examination.

Greene v. McElroy, 360 U.S. 474, 496.

No hearing was held in the present case. Petitioner has had no opportunity to reply to the charges of misconduct made against him or to produce evidence in refutation of said charges.

3. Petitioner contends that the limited evidence before the Court of Appeal does not support the accusations made against him; that the charges are untrue; that upon a noticed hearing, he can produce overwhelming and unimpeachable evidence disproving the Court of Appeal's charges of misconduct against him; and he seeks a hearing in this Court, an opportunity to disprove the charges made against him, and public exoneration by this Court.

See:

Petition of Samuel H. Sterling, (Colo., 1965) 301 P. 2d 346.

* * *

B. The Court of Appeal May Not Impair Petitioner's Good Name, Reputation, Honor or Integrity or Impair His Professional Career Without Affording Him Notice of the Charges Against Him and an Opportunity to Be Heard.

1. It is Petitioner's contention that the injury to him resulting from the publication of the Court of Appeal's opinion will result in an unconstitutional impairment of Petitioner's good name, reputation, honor

and integrity without due process of law. Thus, in the recent case of *Wisconsin v. Constantineau, supra,* the United States Supreme Court declared unconstitutional a Wisconsin statute which permitted a public official to post a notice that Mrs. Constantineau was an excessive drinker without first affording her notice and a hearing to challenge the characterization. The Supreme Court stated:

> "We have no doubt as to the power of a State to deal with the evils described in the Act. The police power of the States over intoxicating liquors was extremely broad even prior to the Twenty-First Amendment. (Citation.) The only issue present here is whether the label or characterization given a person by 'posting,' though a mark of serious illness to some is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard. We agree with the District Court that the private interest is such that those requirements of procedural process must be met.
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> "It is significant that most of the provisions of the Bill of Rights are procedural, for it is procedure that marks much of the difference between rule by law and rule by fiat.
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> ". . . certainly where the State attaches 'a badge of infamy' to the citizen, due process comes into play. (Citation.) '. . . the right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.' (Citation.)
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> *"Where a person's good name, reputation, honor or integrity are at stake because of what the*

> *government is doing to him, notice and an opportunity to be heard are essential.* . . . Only when the whole proceedings leading to the pinning of an unsavory label on a person are aired can oppressive results be prevented." (Emphasis added.)

In the present case, there can be no question but that ~~the~~ publication of the Court of Appeal opinion will seriously impair Petitioner's good name, reputation, honor and integrity. The opinion was not certified for non-publication, and will be circulated among attorneys, judges and others throughout this State and elsewhere. The injury to Petitioner's reputation and career from the publication and distribution of this opinion is incalculable. Mr. Witkin has described criticism of an attorney in a judicial opinion as "a severe sanction". (Witkin, California Procedure, 2d Ed., Vol. I, p. 195) In many of the cases cited therein, the criticism of counsel is mild compared to the criticism of Petitioner in the present case.

Where, as here, the alleged misconduct did not occur in the presence of the Court and does not appear in the record before the court, publication of the Court's decision violates procedural due process unless the charges and inferences of misconduct are based upon a noticed hearing which fulfills the requirements of the process of law. As discussed below, neither notice nor hearing has been afforded in the present case.

2. In addition, the publication of the Court of Appeal opinion decision will impair Petitioner's reputation and good name in the legal community and may adversely affect his ability to engage in the practice of law. As stated in *Endler v. Schutzbank, supra,* 68 Cal.2d 162, at 172:

> "Procedural due process requires notice, confrontation, and a full hearing whenever action by the state significantly impairs an individual's freedom to pursue a private occupation."

And at 173:

> "We thus affirm an elementary requirement of justice when we hold, as we do here, that the state may not make a man an outcast in his own profession without affording him *a full opportunity* to present his defense." (Emphasis added)

C. The Court of Appeal Has Failed to Afford Petitioner Notice and a Hearing in Accordance With Due Process of Law.

The Court of Appeal's statements accusing Petitioner of numerous acts of misconduct all involve factual determinations by that Court concerning events to which that Court was not a percipient witness. Neither do said purported acts of misconduct appear in the record before the Court of Appeal. Indeed, the Findings of Fact of the Trial Court, the Declarations by the trial judges who participated in the case and observed Petitioner and the other trial counsel, and the minute order of the Shasta County Superior Court for March 14, 1969, are directly contrary to the statements of the Court of Appeal.

Under such circumstances, procedural due process requires notice, confrontation, and a full hearing. We enumerate below the particulars in which the proceedings before the Court of Appeal were deficient and unfair:

1. Petitioner Was Not Given Notice of the Charges of Misconduct Appearing in the Court of Appeal Opinion.

In the case of *In re Ruffalo,* 390 U.S. 544, the United States Supreme Court held that an attorney could not be disbarred from Federal Court on the basis of a charge not included in the original accusation against him. It appears that twelve charges of misconduct were brought against Mr. Ruffalo in a State Board proceeding and that during the hearing, on the basis of defense evidence introduced by Ruffalo, a thirteenth charge of misconduct was added concerning his employment of a Mr. Orlando. He was subsequently disbarred from the Federal District Court on the basis of Charge No. 13. In reversing the Order of the District Court, the Supreme Court stated at pages 550-551:

> "In the present case Petitioner (Ruffalo) had no notice that his employment of Orlando would be considered a disbarment offense until *after* both he and Orlando had testified at length on all the material facts pertaining to this phase of the case. As Judge Edwards, dissenting below, said, 'Such procedural violation of due process would never pass muster in any normal civil or criminal litigation.' 370 F. 2d at 462.
>
> "These are adversary proceedings of a quasi-criminal nature (citation). The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. . . ."

The Court continued at page 552:

> "This absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprive Petitioner of procedural due process."

See also:

Murray v. Murphy, (N.Y. -1969) 24 N.Y. 2d 150, 247 N.E. 2d 143, 147;

Cf. Shively v. Stewart, (1966) 65 Cal. 2d 475, 480;

Cole v. Arkansas, 333 U.S. 196, 201.

While the foregoing authorities are concerned primarily with administrative proceedings,[5] it is clear that the same principles apply to judicial conduct. Thus, in connection with the Court's authority to adjudge a person in contempt under C.C.P. §1211, the rule was stated as follows in *Arthur v. Superior Court, supra,* 62 Cal. 2d 404, at 407-408:

> "Contempt committed in the immediate view and presence of the court, known as direct contempt, may be treated summarily. All that is required is that an order be made reciting the facts, adjudging the person guilty, and prescribing the punishment. If, howevre, the contempt did not occur in the immediate view and presence of the court, it becomes indirect contempt and a more elaborate procedure must be followed in order to notify the person so charged and to allow him an opportunity to be heard. In such cases an affidavit must be presented to the court stating the facts constituting the contempt, an order to show cause must be issued, and a hearing on the facts must be held by the judge. (Citation.)"

The foregoing requirements of due process have not been met in the present case. Notice of charges was not furnished to Petitioner. The Court of Appeal did address a letter to all counsel dated October 8, 1970.[6] In said letter, the Court requested explanation of two matters only:

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[5] Or with a criminal proceeding, as in *Cole v. Arkansas.*

> a. ". . . explanation as to how and why such findings (those signed by the Trial Court) were so prepared and under what representations the court was induced to sign findings outside the record.", and
>
> b. The circumstances concerning the agreement between Mr. Halpin and Petitioner concerning the binding effect of the instant lawsuit. As to this second charge only, the Court requested argument "on why sanctions for commission of a fraud upon the Superior Court and upon this Court should not be imposed."

Even if the October 8th letter satisfied the notice requirements of due process, which Petitioner contends. it does not, it would relate only to the two matters concerning which information was requested, and it put Petitioner on notice of an accusation against him only as to the second charge. It did not put Petitioner on notice of any of the numerous findings of misconduct appearing in the Court's opinion.[7] . It is Petitioner's contention that, given proper notice and a fair hearing before an impartial tribunal, he can produce overwhelming and unimpeachable evidence to refute the Court of Appeal's accusations and findings.

2. Petitioner Has Not Been Afforded a Hearing.

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[6] Referred to at page 6 of the Court's decision as a request for "explanation." But this Court should note that the letter already treats as fact certain matters even before reply was made.

[7] We say "Findings" because such statements in an appellate court opinion are taken as fact by the bar and by the public.

Another basic requirement of procedural due process is the right to confrontation and cross-examination. This requirement was explained as follows in *Greene v. McElroy*, 360 U.S. 474, commencing at page 496:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases (citations) but also in all types of cases where administrative and regulatory actions were under scrutiny (citations). . . ."

In the present case, the only hearing or trial which meets the requirements of due process in the civil trial which occurred in Sacramento Superior Court before Judge Perluss. However, that case did not involve any charges of misconduct against Petitioner. Moreover, as discussed more fully below, the Trial Court made findings of fact based on sworn testimony and cross-examination in adversary proceedings concerning the existence of a settlement agreement between Warehouse and Giles which support Petitioner's position here and are directly at odds with the factual determinations made by the Court of Appeal and upon which the Court of Appeal based its most serious accusations of misconduct. The minute order of the Shasta County Superior Court for March 14, 1969 is likewise incompatible with the most serious charges the Court of Appeal has made against Petitioner. Under these circumstances, the need for a hearing which includes the right to confrontation and cross-examination of witnesses is particularly compelling.